Supreme Court, U.S.
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No. 90-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

TRAILER MARINE TRANSPORT CORPORATION,
Petitioner,

v.

ZAPATA GULF MARINE CORPORATION,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented has two parts:

1. Whether a motion for sanctions is different from a motion to alter or amend a judgment under Rule 59(e) of the Federal Rules of Civil Procedure, and

2. Whether a motion for prejudgment interest under § 4(a) of the Clayton Act—which requires the district court to consider *only* dilatory and bad faith trial conduct and not the merits of the underlying action or the damages—is a collateral motion for sanctions,

so that a notice of appeal from the merits judgment filed while the motion was pending was timely and effective.

STATEMENT OF PARTIES

All parties in the court below are named in the caption. Trailer Marine Transport Corporation ("TMT") is a wholly owned subsidiary of Crowley Towing and Transportation Co., which in turn is a wholly owned subsidiary of Crowley Maritime Corporation. TMT is the sole owner of American Transport Lines, Inc., which owns a 50% interest in a Panamanian corporation, Operadores De Carga, S.A. ("ODC"), a holding company. ODC in turn has two wholly owned Brazilian subsidiaries, United States Lines DO Brazil, S.A. and U.S. Lines Terminais De Carga, S.A.

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PETITION FOR WRIT OF CERTIORARI

Trailer Marine Transport Corporation ("TMT") respectfully petitions this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit dismissing on timeliness grounds TMT's appeal from an antitrust judgment against it in an amount in excess of $47,000,000, over two-thirds of which consists of tripled damages and interest.[1] The Court of Appeals held that a motion for sanctions, in the form of prejudgment interest under § 4(a) of the Clayton Act, was a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e). The court held that the pendency of the motion for sanctions nullified TMT's otherwise timely filed notice of appeal. Although the court purported to

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[1] The judgment is comprised of a $41,000,000 treble damage award, costs, attorney's fees, and postjudgment interest accruing at the rate of over $10,000 per day.

rely upon the decision of this Court in *Osterneck* v. *Ernst & Whinney*, 489 U.S. 169 (1989), its ruling is flatly inconsistent with that case and conflicts with rulings in other circuits as well.

OPINIONS AND ORDERS BELOW

The February 25, 1991 *per curiam* opinion of the Court of Appeals dismissing TMT's appeal is reported at 925 F.2d 812 and reproduced in Appendix ("App.") A, 1a-7a. The April 2, 1991 order of the Court of Appeals denying TMT's Petition for Rehearing and Suggestion for Rehearing *En Banc* is unreported and reproduced in App. B, 8a-9a. That court's April 25, 1991 order staying issuance of its mandate pending the filing of this Petition, to and including May 15, 1991, is unreported and reproduced in App. N, 89a.

JURISDICTION

1. The Court of Appeals issued its decision on February 25, 1991. That court denied TMT's timely filed petition for rehearing on April 2, 1991, and this Petition is being filed within ninety days of that date. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1254(1).

2. The district court's jurisdiction was based upon § 4(a) of the Clayton Act, 15 U.S.C. § 15(a), and 28 U.S.C. § 1337.

STATUTES AND RULES INVOLVED

This case principally involves the following statutes and rules:

1. Clayton Act, § 4(a), 15 U.S.C. § 15(a), provides:

> "(a) Amount of recovery; prejudgment interest
>
> Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court

of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

> (1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;
>
> (2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and
>
> (3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof."

2. Fed. R. Civ. P. 11 provides, in pertinent part:

"Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall

sign the party's pleading, motion, or other paper and state the party's address . . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee."

3. Fed. R. Civ. P. 59(e) provides:

"(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

4. Fed. R. App. P. 4(a)(4) provides:

"(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of

appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing."

STATEMENT OF THE CASE

The facts and procedural background relevant to the question presented in this Petition can be briefly stated. On March 2, 1990, a New Orleans jury returned a verdict of $14,000,000 in "actual damages" in favor of respondent for alleged violation of federal antitrust laws. Because the district court previously "had severed and stayed certain counterclaims and third-party demands that remained to be adjudicated," App. A, 2a, respondent moved for entry of a final appealable judgment pursuant to Fed. R. Civ. P. 54(b). In its memorandum in support of its Rule 54(b) motion, respondent indicated that it intended to make a request for Clayton Act prejudgment interest, App. C, 24a n.2, but nonetheless argued that there was "no just reason for delay in entering a 54(b) judgment" because, *inter alia*, TMT's counterclaims were "frivolous." App. C, 24a-25a.

Over TMT's opposition, respondent's Rule 54(b) motion was granted. The district court trebled the jury's award, and on March 22, 1990, entered a Rule 54(b) judgment for $41,000,000 against TMT, App. D, 27a, thereby certifying the case for appeal.[2] Postjudgment interest has brought the award to over $47,000,000 to date.

On March 27, 1990, respondent filed motions seeking costs, attorney's fees, and prejudgment interest under § 4(a) of the Clayton Act, 15 U.S.C. § 15(a). Respond-

[2] The district court trebled the jury's $14,000,000 actual damage award and then deducted $1,000,000 to account for the fact that one defendant entered into a settlement in that amount prior to verdict.

ent asserted its claim for prejudgment interest in a pleading captioned "Motion for Prejudgment Interest Pursuant to Section 4 of the Clayton Act," *see* App. F, 35a, and argued in an accompanying memorandum that prejudgment interest should be imposed to punish TMT for its efforts to "intentionally delay this litigation," its "[d]ilatory" motions practice and "frivolous" counterclaims. *See* App. F, 40a, 47a.

On April 5, 1990, TMT filed motions for judgment notwithstanding the verdict and a new trial, pursuant to Fed. R. Civ. P. 50(b) and 59, respectively. The district court denied TMT's post-trial Rule 50(b) and 59 motions on August 24, 1990. *See* App. G, 49a. On September 21, 1990, TMT filed its notice of appeal to the Fifth Circuit. App. H, 51a.

In an October 15, 1990 order, the district court denied respondent's motion for Clayton Act prejudgment interest, and granted in part respondent's request for costs. *See* App. J. 54a.[3] The district court's October 15 order regarding costs and prejudgment interest expressly concluded that it would not be "just" to impose prejudgment interest to sanction TMT under § 4(a) of the Clayton Act because there was "no evidence" that "TMT acted in bad faith," that its litigation conduct resulted in "significant delay," or that it had violated any other rules "sanctioning dilatory behavior." App. J, 63a. At the request of the parties, in order not to "jeopardize the pending appeal," App. K, 77a, the court did not amend the preexisting Rule 54(b) judgment, but instead entered a separate judgment on November 9, 1990, denying respondent's motion for prejudgment interest. App. M, 88a.

On January 11, 1991, respondent filed a motion to dismiss TMT's appeal, citing this Court's decision in *Oster-*

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[3] The district court entered an order the same day requiring that the parties jointly "attempt to resolve any factual disputes" regarding respondent's claims for attorney's fees. App. I, 53a.

neck v. *Ernst & Whinney*, 489 U.S. 169 (1989), "on the grounds that no timely notice of appeal has been filed." In opposition to respondent's motion, TMT contended that *Osterneck* was wholly "inapposite" to this case. On February 25, 1991, the Fifth Circuit, relying upon *Osterneck*, granted respondent's motion to dismiss the appeal. App. A, 3a-4a, 7a. The Court of Appeals reasoned that respondent's motion for prejudgment interest under the Clayton Act constituted a motion to alter or amend the judgment under Rule 59(e) of the Federal Rules of Civil Procedure. App. A, 4a. Accordingly, it concluded that, because TMT's notice of appeal had been filed prior to disposition of that motion, the notice of appeal was premature for purposes of Rule 4(a)(4) of the Federal Rules of Appellate Procedure, which provides, *inter alia*, that a notice of appeal filed during the pendency of a Rule 59(e) motion shall "have no effect."

TMT's petition for rehearing explained, *inter alia*, that sanctions in the form of prejudgment interest under the Clayton Act were entirely different from prejudgment interest as considered by the *Osterneck* Court in that the former did not involve reconsideration of matters encompassed within the decision on the merits and, in fact, were wholly independent of the underlying antitrust claim.[4] Nonetheless, on April 2, 1991, the Court of Appeals denied TMT's petition for rehearing and suggestion for rehearing *en banc*. App. B, 8a.

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[4] TMT expressly asserted in its opposition to respondent's motion to dismiss that respondent's motion for Clayton Act prejudgment interest was not a Rule 59(e) motion and that *Osterneck* was inapplicable to this case. TMT specifically articulated the argument that it advances in this Court—that Clayton Act "prejudgment interest" is a sanction and different in kind than the equitable prejudgment interest at issue in *Osterneck*—in its petition for rehearing and suggestion for rehearing *en banc* in the court below. That is more than sufficient for purposes of this Court's jurisdiction to review the question presented in this Petition. *See, e.g., United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263 (1982) (summarily reversing on issue raised in the court below for the first time in

REASONS FOR GRANTING THE WRIT

I. THERE IS A CONFLICT AMONG THE CIRCUITS ON THE IMPORTANT AND SUBSTANTIAL QUESTION PRESENTED BY THIS CASE

Petitioner TMT has been denied the right to appeal a $47,000,000 treble damage judgment despite filing a timely notice of appeal. That deprivation of a crucial right occurred because the Fifth Circuit confused a motion for sanctions with a motion to alter or amend the judgment. The two motions are entirely different. Some federal circuits recognize that difference but others, now including the Fifth Circuit, do not. There is thus a clear conflict among the circuits. It is important that this Court grant the writ and reverse the judgment below in order to make clear, once and for all, that a motion for sanctions is not a motion to alter or amend a judgment under Rule 59(e) of the Federal Rules of Civil Procedure.

This is the ideal case in which to address and settle the issue because § 4(a) of the Clayton Act is not merely one source of sanctions authority among many; instead, it incorporates all other sources of sanctions for litigation misbehavior by providing in subsection (2) that the trial

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petition for rehearing); *see id.*, at 271 (Blackmun, J., dissenting). In fact, this Court would have jurisdiction even if TMT had not made this precise argument in the Court of Appeals. *See, e.g., Dewey v. Des Moines*, 173 U.S. 193, 198 (1899) ("Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed."); *Stanley* v. *Illinois*, 405 U.S. 645, 658 & n.10 (1972) (although precise issue was not raised below, it could be considered in this Court because it involved the same "constitutional premise raised below" and "the method of analysis [was] readily available to the state court"); *Vance* v. *Terrazas*, 444 U.S. 252, 259 n.5 (1980) ("consideration of issues not present in the jurisdictional statement or petition for certiorari and not presented in the Court of Appeals is not beyond our power, and in appropriate circumstances we have addressed them"); *see also Carlson* v. *Green*, 446 U.S. 14, 17 n.2 (1980).

judge shall consider whether a party or lawyer "violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings."

This case dramatically illustrates the courts of appeals' need for this Court's guidance on the relationship of motions for litigation sanctions to Rule 59(e) and hence to the finality and appealability of judgments. TMT filed its notice of appeal from a judgment certified as final under Fed. R. Civ. P. 54(b) while a motion for sanctions under § 4(a) of the Clayton Act was pending. Respondent argued the motion as a request for sanctions due to TMT's litigation behavior. TMT opposed the motion by defending its litigation behavior. And the trial judge denied the motion after considering, as § 4(a) of the Clayton Act requires, *only* the propriety of TMT's litigation behavior. There was no doubt in anyone's mind that sanctions were the sole issue.

It was not until respondent moved to dismiss TMT's appeal in the Fifth Circuit that Rule 59(e) was even mentioned. Yet the Court of Appeals treated what was clearly a motion for sanctions as a motion going to the merits of the judgment. The court stated: "We first must ask whether a motion for prejudgment interest qualifies as a Rule 59 motion. The Supreme Court has stated definitively that it does." App. A, 3a. The panel cited *Osterneck* v. *Ernst & Whinney*, 489 U.S. 169 (1989), for that proposition, though that case required the opposite conclusion. The panel then held that the motion's pendency made TMT's notice of appeal ineffective under Rule 4(a)(4) of the Federal Rules of Appellate Procedure, and dismissed TMT's appeal.

That result is not only spectacularly unjust but directly contrary to this Court's decision in *White* v. *New Hampshire Dept. of Employment Security*, 455 U.S. 445 (1982), and in *Osterneck* itself. *White* and *Osterneck* laid down the proper method for analyzing when a mo-

tion seeks to alter or amend a judgment and when it does not. The correct analysis has nothing to do with the name of the motion and everything to do with its relation to the judgment on the merits. *White* made clear that Rule 59(e) motions call for "reconsideration of matters properly encompassed in a decision on the merits." 455 U.S., at 451. Motions not calling for such reconsideration are collateral and not within Rule 59(e). The motion for prejudgment interest in *Osterneck*, as the Court emphasized, was a request for compensation and hence required the district court to reexamine the central judgment. A motion for sanctions because of litigation misconduct does not require, or even involve, such a reexamination. As TMT will demonstrate, *see infra* pages 13-23, a motion for prejudgment interest under § 4(a) of the Clayton Act actually prohibits the district court from reexamining the judgment, the merits of the underlying case, the damages, or anything other than litigation behavior. It is thus a pure sanctions motion.

Despite the clarity of *White* and *Osterneck* the lower courts remain in a state of confusion regarding the status of motions for litigation sanctions under Rule 59(e). The majority of the courts of appeals that have addressed the issue correctly regard such motions as comparable to motions for costs and attorney's fees, and have therefore concluded that motions for sanctions do not implicate Rule 59(e). *See, e.g., Lupo* v. *R. Rowland & Co.*, 857 F.2d 482 (8th Cir. 1988) (Rule 11); *Gordon* v. *Heimann*, 715 F.2d 531 (11th Cir. 1983) (28 U.S.C. § 1927); *Jackson Marine Corp.* v. *Harvey Barge Repair, Inc.*, 794 F.2d 989 (5th Cir. 1986) (Rule 11 and 28 U.S.C. § 1927); *see also Mary Ann Pensiero, Inc.* v. *Lingle*, 847 F.2d 90, 98 (3d Cir. 1988) ("the rationale of *White* governs post-appeal Rule 11 filings" because "a Rule 11 motion is 'uniquely separable' and collateral from the decision on the merits"); *Hicks* v. *Southern Maryland Health Systems Agency*, 805 F.2d 1165, 1166 (4th

Cir. 1986) (observing that this Court's decision in *White* dealt with an award of attorney's fees "but the reasoning applies as well to awards under Rule 11 and the other statutes").

Even after *White* and *Osterneck*, however, the Second Circuit in *Fisher* v. *Klein*, 873 F.2d 626 (2d Cir. 1989), squarely held that a motion for litigation sanctions labeled as a Rule 59(e) motion "renders ineffective" "any notice of appeal filed before the motion is decided" under Rule 4(a)(4). *Id.*, at 627. The appeal there, as here, was dismissed. Evidence of confusion about the relationship between sanctions motions and Rule 59(e) is to be found in other cases. *See, e.g., Kurkowski* v. *Volcker*, 819 F.2d 201, 203 (8th Cir. 1987) ("the defendants moved the court to impose sanctions . . . within 10 days of the original judgment. Specifically, the defendants asked the court to alter or amend the judgment under Rule 59(e). Clearly the district court had jurisdiction to amend the judgment to impose Rule 11 sanctions against the plaintiffs."); *see also Beeman* v. *Fiester*, 852 F.2d 206, 208 (7th Cir. 1988); *Wojan* v. *General Motors Corp.*, 851 F.2d 969, 973 (7th Cir. 1988).

The Fifth Circuit has now joined the Second Circuit in holding that a motion for sanctions is a motion to alter or amend the judgment while the Third, Fourth, Eighth, and Eleventh Circuits disagree. Thus, notices of appeal that would be regarded as effective in four circuits are regarded as nullities in two circuits. Some litigants have their appeals heard on the merits while others identically situated, like TMT, have their appeals dismissed. This injects an intolerable degree of uncertainty and injustice into the federal appellate process.

The Fifth Circuit's application of the *Osterneck* rule to hold that a motion for sanctions, which is entirely separate from and unconnected with the underlying judgment, is nevertheless a Rule 59(e) motion squarely contradicts the method of analysis the Court so care-

fully delineated in *Osterneck*. Rather than achieving " 'operational consistency and predictability,' " [5] that misapplication of *Osterneck* will, as it has in this case, create confusion and produce extreme and unjust results.

The Court has fashioned a number of " 'bright-line rule[s], which accord[] with traditional understanding'," *Osterneck*, 489 U.S., at 176-77 n.3 (quoting *Budinich*, 486 U.S., at 200), to ensure, among other things, that litigants are not unjustly deprived of the right to appeal. In *White*, the Court held that a request for attorney's fees was not a Rule 59(e) motion and therefore did not vitiate a timely filed notice of appeal. The Court reached the same conclusion with respect to a motion for costs in *Buchanan* v. *Stanships, Inc.*, 485 U.S. 265 (1988). Last Term in *Cooter & Gell* v. *Hartmarx Corp.*, 110 S. Ct. 2447, 2456 (1990), the Court explicitly equated a motion for sanctions under Rule 11 of the Federal Rules of Civil Procedure with motions seeking "costs [and] attorney's fees" for jurisdictional purposes.

This Court has not, however, squarely held that a motion for litigation sanctions, whether under Rule 11, § 4(a) of the Clayton Act, or other sources of authority, is collateral and not a Rule 59(e) motion whose pendency renders a notice of appeal from the merits judgment ineffective. The increased frequency of motions for sanctions [6] makes such a holding particularly necessary. The present case, because it involves a statute that subsumes all sources of authority for litigation sanctions, presents

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[5] *Osterneck*, 489 U.S., at 176-77 n.3 (quoting *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196, 200 (1988)).

[6] The burgeoning "satellite litigation" over the imposition of sanctions, *see Cooter & Gell*, 110 S. Ct., at 2454, has resulted in a "new 'Era of Sanctions' " in which such motions are a regular and frequent component of the federal civil justice system. *See Eastway Construction Corp.* v. *City of New York*, 821 F.2d 121, 125 (2d Cir.) (Pratt, J., dissenting), *cert. denied*, 484 U.S. 918 (1987); Schwarzer, *Rule 11 Revisited*, 101 Harv. L. Rev. 1013, 1017 (1988).

the ideal vehicle for disposing of the question and resolving the conflict among the circuits. TMT will next show that the answers to the questions presented by this case are so clear that the Court should grant the Petition and, we suggest, summarily reverse the judgment below.

II. THE COURT SHOULD GRANT THE PETITION AND SUMMARILY REVERSE THE COURT OF APPEALS' DECISION IN THIS CASE BECAUSE A MOTION FOR SANCTIONS, HERE IN THE FORM OF CLAYTON ACT PREJUDGMENT INTEREST, IS CLEARLY NOT A RULE 59(e) MOTION TO ALTER OR AMEND THE JUDGMENT

The Fifth Circuit's holding in this case, that a motion for sanctions, here in the form of Clayton Act prejudgment interest, constitutes a Rule 59(e) motion to alter or amend a judgment, is clearly erroneous under *White*, *Osterneck* and other decisions of this Court.

As this Court has pointed out, the draftsmen of Rule 59(e) "had a clear and narrow aim. According to the accompanying Advisory Committee Report, the Rule was adopted to 'mak[e] clear that the district court possesses the power' to rectify its own mistakes in the period immediately following the entry of the judgment." *White*, 455 U.S., at 450. Accordingly, the Court in *White* established a clear dichotomy between a Rule 59(e) motion to alter or amend the judgment, which seeks "reconsideration of matters properly encompassed in a decision on the merits," *id.*, at 451, and a motion that "raises legal issues collateral to the main cause of action . . . to which Rule 59(e) was never intended to apply." *Id.* That central distinction has been reemphasized in a series of decisions by this Court. In *Budinich*, for example, Justice Scalia explained for a unanimous Court that a "question remaining to be decided after an order ending litigation on the merits does not prevent finality *if its resolution will not alter the order* or moot *or revise decisions embodied in the order*." 486 U.S., at 199 (emphasis added).

It was on this analytical basis that *Osterneck* held that an equitable, nonstatutory motion for prejudgment interest was a motion to alter or amend the judgment and hence fell within Rule 59(e). The Court explained its decision in two ways:

> First, we have repeatedly stated that prejudgment interest "is an element of [plaintiff's] complete compensation." Thus, unlike attorney's fees, which at common law were regarded as an element of costs and therefore not part of the merits judgment, prejudgment interest traditionally has been considered part of the compensation due plaintiff.

489 U.S., at 175 (citations omitted). As will be shown, Clayton Act prejudgment interest is explicitly *not* an element of plaintiff's complete compensation. It is a sanction like those imposed under Fed. R. Civ. P. 11 and, like costs[7] and attorney's fees,[8] is not a part of the merits judgment.

The *Osterneck* Court continued:

> Second, unlike a request for attorney's fees or a motion for costs, a motion for discretionary prejudgment interest does not "rais[e] issues wholly collateral to the judgment in the main cause of action," . . . . In deciding if and how much prejudgment interest should be granted, a district court must examine—or in the case of a post-judgment motion, reexamine—matters encompassed within the merits of the underlying action.

Id., at 175-76 (citations omitted). The Court noted that in a federal securities case, like *Osterneck*, where prejudgment interest is awarded under principles of equity, the district court would "consider a number of factors, including whether prejudgment interest is necessary to compensate the plaintiff fully for his injuries, the degree

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[7] *Buchanan*, 485 U.S., at 268-69.

[8] *White*, 455 U.S., at 451.

of personal wrongdoing on the part of the defendant, the availability of alternative investment opportunities to the plaintiff, whether the plaintiff delayed in bringing or prosecuting the action, and other fundamental considerations of fairness." *Id.*, at 176. All of these factors relate to the conduct of the defendant that gave rise to the cause of action and the remedy needed to redress it. None of them relate to the behavior of the defendant or its attorneys in the course of the litigation. As the Court explained, "[t]hese considerations are intertwined in a significant way with the merits of the plaintiff's primary case as well as the extent of his damages." *Id.* Thus, such a motion necessarily "involves the kind of reconsideration of matters encompassed within the merits of a judgment to which Rule 59(e) was intended to apply." *Id.*

This Court could not have been clearer in four unanimous or nearly unanimous decisions, all within the last decade (*White*, *Buchanan*, *Budinich*, and *Osterneck*), that, to fall within Rule 59(e)'s category of motions to alter or amend the judgment, or otherwise to affect the finality of a judgment for purposes of appeal, the motion must *require* reconsideration of the merits or the damages. By contrast, § 4(a) of the Clayton Act could not be clearer that a motion for prejudgment interest made under that section affirmatively *precludes* the district court from reconsidering the merits of the underlying case or the amount of damages. The Act specifically provides that, in making that determination, "the court shall consider *only*":

> (1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit, as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;
>
> (2) whether, in the course of the action involved, such person or the opposing party, or either party's

representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

15 U.S.C. § 15(a) (emphasis added). Thus, the explicit terms of § 4(a) make clear that prejudgment interest under the Clayton Act serves the *exclusive* purpose of deterring and punishing dilatory and other improper *litigation* tactics by antitrust litigants.[9]

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[9] *See Fishman* v. *Estate of Wirtz*, 807 F.2d 520, 561 (7th Cir. 1986) ("The Clayton Act as amended only permits a private antitrust plaintiff to recover prejudgment interest if the defendant is guilty of unnecessary delay," and does not permit such relief to make the plaintiff "whole"); *Smith* v. *Pro-Football, Inc.*, 528 F. Supp. 1266, 1275 (D.D.C. 1981) (purpose of Clayton Act § 4(a) is to provide "disincentive for litigants to use delaying tactics"); Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 Tulane L. Rev. 777, 784 n.31 (1987) (purpose of statutory prejudgment interest under Clayton Act "is not to compensate plaintiffs for lost opportunity costs but rather to punish defendants for improper behavior"); Note, *When Is an Attorney Unreasonable and Vexatious?*, 45 Wash. & Lee L. Rev. 249, 266 (1988) ("By authorizing the award of prejudgment interest under the Clayton Act, Congress intended to discourage attorneys from using litigation tactics solely to delay litigation.").

Prior to 1980, when the prejudgment interest provision was added to the Clayton Act as part of the Antitrust Procedural Improvements Act of 1980, Pub L. No. 96-349, § 4(a)(1), 94 Stat. 1154, 1156 (1980), the courts refused to award prejudgment interest precisely because prejudgment interest was traditionally viewed as additional compensation and Clayton Act "trebled damages . . . more than adequately compensate [the antitrust plaintiff] for its injuries." *Trans World Airlines, Inc.* v. *Hughes*, 449 F.2d 51, 80 (2d Cir. 1971), *rev'd on other grounds*, 409 U.S. 363 (1973). *Accord Locklin* v. *Day-Glo Color Corp.*, 429 F.2d 873, 877 (7th Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971). As reflected by the plain language of the statute, Congress manifestly sought to address only

Although the conclusion that § 4(a) has no compensatory function is abundantly clear from § 4(a) itself, that point is underscored by a parallel provision enacted the same day, *see* Pub. L. No. 96-349, § 4(a)(2), 94 Stat. 1154, 1156 (1980), and codified at 15 U.S.C. § 15a. Section 15a pertains to antitrust injuries sustained by the United States and allowed (until 1990) only actual, rather than treble, damages. In authorizing prejudgment interest in government suits, the 1980 amendments to the Clayton Act permitted the district court to consider the identical three factors enumerated in § 4(a), and then added a fourth: "(4) whether the award of such interest is necessary to *compensate* the United States adequately for the injury sustained by the United States." 15 U.S.C. § 15a(4) (emphasis added). Accordingly, "although Congress was well aware of the policy of allowing prejudgment interest to make a plaintiff whole" and sought to vindicate that policy with respect to antitrust actions brought by the government, it deliberately "chose not to give courts the authority to consider this policy in the context of awarding prejudgment interest to the private antitrust plaintiff." *Fishman*, 807 F.2d, at 562 n.42.

That a motion for prejudgment interest under the Clayton Act is not a motion to alter or amend a judgment under Rule 59(e) is also made plain by the differing time limits for the two motions. A Rule 59(e) motion must be made within 10 days of entry of a judgment. *See* Fed. R. Civ. P. 59(e). A motion for prejudgment interest under the Clayton Act need only be made "promptly." 15 U.S.C. § 15(a). Congress therefore precluded a Clayton Act prejudgment interest motion from being considered a Rule 59(e) motion by allowing such a motion to be filed when a Rule 59(e) motion would be time-barred.

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the "very limited" concern with litigation tactics, *see Fishman*, 807 F.2d, at 562 n.43, when it enacted § 4(a), deliberately excluding considerations relating to compensation from the grant of authority to award prejudgment interest.

Congress had no reason to limit a Clayton Act prejudgment interest motion to 10 days after the judgment because consideration of the motion does not affect the finality of the judgment. In this respect, too, a Clayton Act prejudgment interest motion resembles a Rule 11 motion, which sets no time limit, rather than a Rule 59(e) motion.

The clear distinction between an award of prejudgment interest under § 4(a) of the Clayton Act—which does not go to the merits and excludes compensation as a goal—and the equitable award of prejudgment interest —which is a part of the underlying claim and focuses on compensation—is decisive of the applicability of *Osterneck* to this case. Because an award of prejudgment interest under the Clayton Act "does not remedy the injury giving rise to the action," and does not require reconsideration of matters properly encompassed in a decision on the merits, a motion for such sanctions, like a motion for attorney's fees, does not fall within Rule 59(e). *See, e.g., White*, 455 U.S., at 452.[10] Since the district court may consider only the conduct of the litigation, and not the facts underlying the antitrust violation, a Clayton Act prejudgment interest award, like an award of costs or attorney's fees, "is uniquely separable from the cause of action to be proved at trial." *Id.*; *Buchanan*, 485 U.S., at 268-69 ("a request for costs raises issues wholly collateral to the judgment in the main cause of action, issues to which Rule 59(e) was not intended to apply"); *see also Budinich*, 486 U.S., at 200 (judgment is final for purposes of 28 U.S.C. § 1291 despite pendency of motion for attorney's fees).

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[10] "[A]s a general matter, a request for attorney's fees is not part of the merits of the underlying action because such fees are not part of the compensation for the plaintiff's injury but traditionally have been regarded as an element of costs awarded to the prevailing party." *Osterneck*, 489 U.S., at 175.

Indeed, just as the imposition of a Rule 11 sanction "is not a judgment on the merits of an action," *Cooter & Gell*, 110 S. Ct., at 2456, prejudgment interest under the Clayton Act is distinct from the merits because it "requires the determination of a collateral issue: whether the [party or its] attorney has abused the judicial process, and, if so, what sanction would be appropriate." *Id.* Consequently, a motion for sanctions in a private antitrust action, whether filed under § 4(a) or Rule 11, cannot be characterized as a Rule 59(e) motion to alter or amend the underlying judgment on the merits of the action.

In fact, § 4(a) of the Clayton Act actually incorporates the standards of Rule 11 when it directs the court to consider "whether . . . [the litigant] violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior . . . ." 15 U.S.C. § 15(a)(2). The remainder of § 4(a) closely tracks the standards set forth in Rule 11. For example, under § 4(a), the district court must consider whether a defendant "made motions or asserted claims or defenses so lacking in merit as to show that [the defendant] acted intentionally for delay, or otherwise in bad faith," 15 U.S.C. § 15(a)(1), or "engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof." *Id.*, § 15(a)(3). The inquiry under Rule 11 is virtually identical: whether a "pleading, motion or other paper" was "warranted by a good faith argument . . . , and that it [was] not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Fed. R. Civ. P. 11; *see also* Fed. R. Civ. P. 37 (authorizing sanctions for failure to cooperate in discovery); 28 U.S.C. § 1927 (authorizing sanctions against attorney "who so multiplies the proceedings in any case unreasonably and vexatiously").[11]

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[11] Because the award of prejudgment interest under § 4(a) of the Clayton Act is a sanction, and is to be treated by the district

The extremely close relationship between Clayton Act § 4(a) and Rule 11 is also demonstrated by the fact that prejudgment interest can be used as a sanction under Rule 11. In *Davis* v. *Veslan Enterprises*, 765 F.2d 494 (5th Cir. 1985), the Fifth Circuit held that the district court properly imposed sanctions on a defendant for a bad faith removal of a case from a state court to the district court after the jury verdict but before entry of judgment. Since that removal unfairly delayed the entry of judgment and the running of interest, the Fifth Circuit held that "an appropriate sanction" under Rule 11 was the award of prejudgment interest. Thus, prejudgment interest is not by its nature always a motion to alter or amend the judgment. It can be a sanction under Rule 11 as it is under § 4(a) of the Clayton Act.

From beginning to end, the entire course of dealing reflected not only the litigants' but the court's firm understanding that they were dealing with a wholly collateral motion. Respondent clearly sought sanctions for conduct that it characterized as "efforts to delay this litigation." App. F, 40a. The district court demonstrated that it thought it was dealing with a motion for sanctions. It did not consider the Clayton Act motion together with TMT's Rule 59 motion for a new trial and its Rule 50(b) motion for judgment notwithstanding the verdict that were decided by the district court on August 24, 1990. Instead, the district court dealt with what it obviously considered non-Rule 59 matters—costs, attorney's fees, and Clayton Act prejudgment interest—at the same time. *See* App. I, 53a; App. J, 54a; App. L, 87a. Moreover, the court analyzed the Clayton Act motion exclusively as a request for sanctions in the same opinion with its analysis of respondent's motion for costs, App. J, 63a,

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court along with matters such as the entitlement to attorney's fees and costs, *see* 15 U.S.C. § 15(a), as it was in this case, the spectre of piecemeal appellate review identified in *Osterneck*, 489 U.S., at 177, is entirely absent.

and entered a separate judgment denying Clayton Act prejudgment interest. App. M, 88a. This was a clear demonstration by the court that it did not regard a motion for Clayton Act sanctions as one to alter or amend the judgment.

There can be no doubt that depriving TMT of its right to appeal a judgment (which with interest now amounts to a $47,000,000 award) produces a harsh and unjust result, a result supported neither by law nor by any intelligible policy. In this case, the judge announced his decision on the merits, TMT made clear its intention to appeal by filing a notice of appeal, and respondent would suffer no prejudice if the appeal went forward. As in *FirsTier Mtge. Co.* v. *Investors Mtg. Ins. Co.*, 111 S. Ct. 648, 653 (1991), "[l]ittle would be accomplished by prohibiting the court of appeals from reaching the merits . . . ." and "[n]o unfairness to [respondent] results from allowing the appeal to go forward."

The Court's consistent analysis starting with *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939), and continuing through *White*, *Buchanan*, *Budinich* and *Osterneck* is that the determining factor in resolving the question presented here, the "bright line" the Court has identified, is that the *character* of the relief sought and not its *label* will determine whether it is a motion to alter or amend a judgment. If the relief sought requires reconsideration of matters encompassed within the merits, such as the amount of proper compensation to the plaintiff "for the injury giving rise to an action," *White*, 455 U.S., at 452, it will constitute a motion under Rule 59(e) regardless of its label. *See, e.g., Osterneck*, 489 U.S., at 172. But if the relief sought is collateral to the judgment in the main cause of action and independent of the merits, even an inaccurate designation cannot make it a Rule 59(e) motion. *See, e.g., Buchanan*, 485 U.S., at 266. The label given to a postjudgment motion will not

deprive a litigant of the benefit of its timely notice of appeal.

As it did in *Buchanan*, the court below in this case applied not the substantive distinction articulated by this Court in *White*, *Buchanan*, *Budinich* and *Osterneck*, but a rigid, formalistic rule. In *Buchanan*, the Fifth Circuit's rule was that a motion filed within 10 days of the judgment is to be deemed a Rule 59(e) motion. In this case, the Fifth Circuit's rule is that any motion seeking prejudgment interest is a Rule 59(e) motion whether or not it relates to compensation or involves reexamination of the judgment. In *Buchanan*, this Court forcefully rejected the Fifth Circuit's mechanical and logically flawed approach. As the Court made clear in *Buchanan*, dismissal of an appeal based upon a rule that depends more on labels and the time when a motion is filed rather than the purpose and effect of the motion, will be swiftly and decisively set aside. 485 U.S., at 269.

This Court should, therefore, grant TMT's Petition, announce that motions for sanctions, including motions under § 4(a) of the Clayton Act, will not nullify an otherwise timely filed notice of appeal, and summarily reverse the decision below in this case. *See, e.g.*, *Buchanan*, 485 U.S., at 267 (summarily reversing Fifth Circuit's holding that a motion for costs constituted a Rule 59(e) motion); *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263 (1982) (summarily reversing decision holding that denial of motion to dismiss was final and appealable under 28 U.S.C. § 1291); *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56 (1982) (summarily reversing decision holding that premature filing of notice of appeal was not subject to dismissal unless appellee could demonstrate prejudice); *Thompson* v. *INS*, 375 U.S. 384 (1964) (summarily reversing decision holding that notice of appeal was not timely filed); *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U.S. 215, 217 (1962) (same). Both the law and

the equities in this case strongly indicate that would be the proper course here.

CONCLUSION

For the foregoing reasons, the Petition should be granted and the decision of the Fifth Circuit summarily reversed.

Respectfully submitted,

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May 15, 1991

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-3696

ZAPATA GULF MARINE CORPORATION,
Plaintiff-Appellee,
versus

PUERTO RICO MARITIME SHIPPING AUTHORITY, *et al.*,
Defendants,

TRAILER MARINE TRANSPORT CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana

(February 25, 1991)

Before JOHNSON, SMITH, and WIENER, Circuit Judges.

PER CURIAM:

The plaintiff-appellee, Zapata Gulf Marine Corporation (Zapata), has filed a motion to dismiss the instant appeal by defendant-appellant Trailer Marine Transport Corporation (Trailer). The basis of the motion is that Trailer's only notice of appeal was rendered inoperative by the timely filing of a motion for pre-judgment interest. Concluding that Zapata is correct, we grant the motion and dismiss the appeal for want of jurisdiction.

I.

In this antitrust action, on March 2 (all relevant dates being in 1990) the jury found that Trailer was liable to Zapata for various transgressions, including conspiracy in restraint of trade, monopolization, attempt to monopolize, and conspiracy to monopolize. The jury awarded Zapata $14 million in actual damages.

Previously, the district court had severed and stayed certain counterclaims and third-party demands that remained to be adjudicated. Accordingly, on March 8, 1990, Zapata filed a motion for entry of judgment on the jury verdict pursuant to Fed. R. Civ. P. 54(b), which permits, under certain circumstances, entry of a final, appealable judgment on fewer than all of the claims or as to fewer than all of the parties.

The district court granted the motion by entering a rule 54(b) judgment for $41 million (after trebling)[1] on March 22, 1990. The judgment stated that attorneys' fees and costs would be awarded in an amount to be set subsequently and that postjudgment interest would run from date of entry.

On March 27, 1990, Zapata filed and served a motion for prejudgment interest. On May 3, Trailer filed and served a motion for judgment notwithstanding the verdict (j.n.o.v.) and/or for new trial, which was denied on August 24.

On September 21, Trailer filed its only notice of appeal, seeking review of the final judgment of March 22 and the order of August 24 denying j.n.o.v. and new trial. On October 15, the district court entered an order granting in part Zapata's motion to tax costs and denying the motion for prejudgment interest. On November 9 the

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[1] It is not evident, based upon the documentation now before us, why the amount, after trebling, is $41 million rather than $42 million. The discrepancy is irrelevant to our determination of this motion, however.

court entered judgment denying prejudgment interest. Zapata now asserts that, as Trailer did not file a notice of appeal at any time following the denial of prejudgment interest, we have no jurisdiction, and hence this appeal must be dismissed.

II.

In order to determine our jurisdiction, we must ascertain whether Trailer's only notice of appeal, filed September 21, was nullified by the filing of the motion for prejudgment interest. Rule 4(a)(4), Fed. R. App. P., provides that "[i]f a timely motion . . . is filed . . . under [Fed. R. Civ. P.] 59 to alter or amend the judgment . . ., the time for appeal . . . shall run from the entry of the order . . . granting or denying [the] motion. A notice of appeal filed before the disposition of any [such motion] shall have no effect."

We first must ask whether a motion for prejudgment interest qualifies as a rule 59 motion. The Supreme Court has stated definitively that it does. In *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 175 (1989), the Court held that "a postjudgment motion for discretionary [2] prejudgment interest constitutes a motion to alter or amend the judgment under Rule 59(e).

While acknowledging the rule announced in *Osterneck*, Trailer asserts that *Osterneck* is inapposite because it addressed a final judgment encompassing all issues and all parties, while the instant case concerns a rule 54(b) judgment. Trailer argues that, as a rule 54(b) judgment may be entered only upon the district court's conclusion that there is no just reason for delay, such a judgment, unlike a global judgment, is not subject to alteration or amendment by means of a rule 59 motion, the pendency of which would delay finality. Trailer thus reasons that to permit amendment of rule 54(b) judgments would be

---

[2] Although *Osterneck*, like the instant case, dealt with discretionary as distinguished from mandatory, prejudgment interest, the Court noted that the result would be the same for mandatory prejudgment interest. 489 U.S. at 176 n. 3.

to undermine the purpose of the rule, which, in Trailer's view, is to allow an immediate appeal of those determinations that are deemed appropriate for rule 54(b) certification.

We disagree with the bold assertion that a rule 54(b) judgment cannot be amended. Nothing in the plain language of the rules or the cases interpreting them indicates that rule 54(b) judgments are to be treated any differently from other judgments in terms of their amenability to suspension, alteration, and amendment by timely rule 59(e) motions.

Trailer points us specifically to the second sentence of rule 54(b):

> *In the absence of such* [*express determination that there is no just reason for delay*] *and direction* [*for entry of final judgment*], any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and *the order or other form of decision is subject to revision at any time before the entry of judgment. . . .* [Emphasis added.]

Trailer asks us to adopt from this language "the logical implication . . . that where the district court *has* made a determination of finality, then the resulting judgement [sic] is *not* subject to revision." Any other reading, Trailer avers, would render the second sentence superfluous.

To the contrary, however, the second sentence serves an important function in the scheme of rule 54(b): It underscores the requirement that in order to be final and appealable, a "judgment" that does not incorporate all parties and all issues must contain the district court's deter-

mination as set forth in the first sentence of the rule.[3] This requirement gives protection to litigants who need to know when a partial judgment is final and appealable. The rule thereby "addresses an overriding concern for certainty and for an express and unmistakable determination of finality in ambiguous multi-party and multi-claim situations." *FSLIC v. Tullos-Pierremont*, 894 F.2d 1469, 1475 (5th Cir. 1990).

Permitting rule 54(b) judgments to be suspended and, in appropriate cases, amended by means of rule 59(e) motions adds no more uncertainty to the process than in the case of judgments that dispose of all parties and all issues. In the event of a rule 54(b) judgment, the requirement of an express determination of no just reason for delay is an unequivocal notice by the district court that that document constitutes a final, appealable judgment. It has the same effect as any other judgment:

> It triggers those time limits elsewhere in the Rules that run from the entry of judgment; it is immediately appealable and the time limit for appeal runs from its entry. If it is on the merits, it is res judicata; if it is a judgment for money, it starts the running of interest; after 10 days, unless it is stayed, it will support execution. It has the same effect on accrual of liens as any other final judgment; and it can be registered in another district. In sum, it is a final judgment for all purposes.

6 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 54.42 at 54-286 through 54-287 (2d ed. 1990) (footnotes omitted). It follows that, like other judgments, a rule 54(b) judgment is subject to the filing of a rule 59(e) motion that suspends finality and appealability until ruled upon.

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[3] The required determination is examined carefully in our recent opinion in *Kelly v. Lee's Old Fashioned Hamburgers, Inc.*, 908 F.2d 1218 (5th Cir. 1990) (en banc).

In short, there is no reason to suppose that the effect of a rule 59(e) motion on a rule 54(b) judgment should be any different from its effect on other judgments. There is, in particular, no indication that the drafters intended that, as Trailer argues, a rule 54(b) judgment is once and forevermore final and not subject to amendment.

Finally, Trailer points to our recent opinion in *Offshore Production Contractors, Inc. v. Republic Underwriters Ins. Co.*, 910 F.2d 224 (5th Cir. 1990). There, we held that the test for determining whether a supplemental order or judgment affects the time within which a party must pursue an appeal is "whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality." *Id.* at 229 (quoting *FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-12 (1952)). From this holding, Trailer asks us to conclude that, as the October 15 order *denied* prejudgment interest, it did not disturb or revise any legal rights that had been settled by the March 22 judgment and hence had no effect upon the date for filing a notice of appeal.

Offshore Production is inapposite, however, and the quotation is taken out of context. There, the court granted a rule 59(e) motion on August 10 by way of an amended judgment, then, "[f]or reasons which are unclear from the record, . . . entered another amended judgment on August 28 . . ., which did not differ materially from the August 10 judgment." *Id.* at 228. We held that "[t]he mere fact that a court reenters a judgment or revises a judgment in an immaterial way does not affect the time within which litigants must pursue an appeal." *Id.* at 229 (quoting *Minneapolis-Honeywell*, 344 U.S. at 211-12). Plainly, we were addressing the effect *vel non* of the entry of a superfluous order. To the contrary, however, the October 15 order here was anything but redundant,

as it denied a motion for substantial pre-judgment interest.[4]

Accordingly, we conclude that we are without jurisdiction in this matter, as Trailer has not filed an effective notice of appeal,[5] its only notice of appeal being of "no effect" under rule 4(a)(4) because of the pendency of a rule 59(e) motion for prejudgment interest. We have no choice now but to dismiss the appeal.

The motion to dismiss the appeal is GRANTED; the appeal is DISMISSED for want of jurisdiction.

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[4] We observe, as well, that if Trailer's argument based upon *Offshore Productions* were applied consistently in this case, the order of August 24, denying judgment n.o.v. and a new trial, would have had no effect upon the time for appealing, and Trailer's September 21 notice of appeal, filed more than 30 days after March 22, would be untimely.

[5] Zapata asserts that an effective notice of appeal in this case would need to have been filed by December 9, the 30th day after entry, on November 9, of the "judgment" denying prejudgment interest. We do not reach this issue, as Trailer filed no notice of appeal whatsoever following the denial of prejudgment interest. However, we note that rule 4(a)(4) states that "the time for appeal for all parties shall run from the entry of the order . . . granting or denying" a rule 59(e) motion. "Once the rule 59(e) motion was ruled upon, the thirty-day period for appeal began running anew." *Charles L. M. v. Northeast Indep. School Dist.*, 884 F.2d 869, 870 (5th Cir. 1989). By this language, the 30-day period for appeal arguably would have run from the October 15 order denying prejudgment interest. Wary counsel in similar cases should note this possible interpretation of the rules.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-3696

ZAPATA GULF MARINE CORPORATION, ETC.,
Plaintiff-Appellee,
versus

PUERTO RICO MARITIME SHIPPING AUTHORITY, ET AL.,
Defendants,

TRAILER MARINE TRANSPORT CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion February 25, 5 Cir., 1991, —— F.2d ——)

(April 2, 1991)

Before JOHNSON, SMITH and WIENER, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on

rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Sam Johnson
United States Circuit Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-2911

SECTION "I"

MAG. DIV. (6)

ZAPATA GULF MARINE CORPORATION assignee of Robert E. Brizendine of the Chapter 7 estate of American Caribe Lines, Inc.,

Plaintiff

versus

PUERTO RICO MARITIME SHIPPING AUTHORITY; SEA-LAND SERVICE, INC.; and TRAILER MARINE TRANSPORT CORPORATION,

Defendant

MOTION FOR EXPEDITED HEARING ON
MOTION FOR RULE 54(B) CERTIFICATION

NOW INTO COURT, through undersigned counsel, comes Zapata Gulf Marine Corporation, Plaintiff, which hereby moves as follows:

1. A jury verdict in the amount of $14 million was rendered against the Defendant, Trailer Marine Transport Corporation, on Friday, March 2, 1990. Originally, this would be the final verdict to be rendered in this matter.

2. However, there remain outstanding counterclaims and third party demands which have been stayed by the Court.

3. Under Rule 54(b) of the Federal Rules of Civil Procedure, the Court may direct the entry of a final judgment as to fewer than all of the claims or parties when it makes a determination that there is no just reason for delay. Plaintiff has filed a motion requesting such a determination and a Rule 54(b) judgment.

4. Were this matter to be heard in accordance with the ordinary rules of the Court, it could not be heard until Wednesday, March 28, 1990. This would result in an undue delay such as to constitute prejudice to the Plaintiff.

5. It is respectfully submitted that it would be in the best interest of justice that this matter be heard in an expedited manner on the next available motion day of Judge Mentz, i.e., Wednesday, March 14, 1990, or at such other earlier time as the Court may fix.

WHEREFORE, Plaintiff, Zapata Gulf Marine Corporation, prays that its motion for Rule 54(b) entry of Rule 54(b) judgment be heard on an expedited basis.

Respectfully submitted,

/s/ M. Shawn McMurray
EDWARD F. KOHNKE, IV, Esq. # 7824
JOSEPH N. MOLE, Esq. #09538
M. SHAWN MCMURRAY, Esq. #1240
LEMLE & KELLEHER
2100 Pan-American Life Center
601 Poydras Street
New Orleans, LA 70130
Telephone: (504) 586-1241
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 6th day of March, 1990, served a copy of this foregoing pleading upon counsel for all parties to this proceeding by hand delivery.

/s/ M. Shawn McMurray
M. SHAWN MCMURRAY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-2911

SECTION "I"

MAG. DIV. (6)

ZAPATA GULF MARINE CORPORATION assignee of Robert E. Brizendine of the Chapter 7 estate of American Caribe Lines, Inc.,

Plaintiff

versus

PUERTO RICO MARITIME SHIPPING AUTHORITY; SEA-LAND SERVICE, INC.; and TRAILER MARINE TRANSPORT CORPORATION,

Defendant

ORDER

CONSIDERING the Plaintiff's Motion for Expedited Hearing on Motion for Rule 54(b) Certification, and finding that an Expedited Hearing is in the best interest of justice;

IT IS HEREBY ORDERED THAT the Motion for Rule 54(b) Certification filed by Plaintiff, Zapata Gulf Marine Corporation be and it is hereby set for hearing on the 21st day of March, 1990, at 3 o'clock p.m.

New Orleans, Louisiana, this 8th day of March, 1990.

/s/ Henry A. Mentz, Jr.
HONORABLE HENRY A. MENTZ, JR.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-2911

SECTION "I"

MAG. DIV. (6)

ZAPATA GULF MARINE CORPORATION assignee of Robert E. Brizendine of the Chapter 7 estate of American Caribe Lines, Inc.,

Plaintiff

versus

PUERTO RICO MARITIME SHIPPING AUTHORITY; SEA-LAND SERVICE, INC.; and TRAILER MARINE TRANSPORT CORPORATION,

Defendant

MEMORANDUM IN SUPPORT OF MOTION FOR EXPEDITED HEARING ON MOTION FOR 54(B) CERTIFICATION

MAY IT PLEASE THE COURT:

Rule 54(b) of the Federal Rules of Civil Procedure allows the entry of a judgment on a claim when the claim determines fewer than all of the claims presented in the litigation. As the motion filed herewith sets forth, the jury verdict rendered in this matter on March 2, 1990, would ordinarily have concluded all of the claims present in this litigation. However, counsel for the Defendant has refused to voluntarily dismiss the still existent counterclaim and third party demands which it made two years ago in this litigation, seeking damages for the filing of

this allegedly frivolous lawsuit.[1] A Rule 54(b) judgment, therefore, is necessary in order to transform the jury verdict into a final, appealable judgment, and there is no just reason for delay in rendering such a judgment.

However, an expedited hearing is necessary in order to avoid delay; if ordinary motion practice were followed, this motion could not be heard until Wednesday, March 28—nearly one month after the rendering of the jury's verdict. In view of the fact that postjudgment interest on the full $42 million judgment will not start running until the entry of judgment, the prejudice to Plaintiff is apparent and large.

Therefore, it is respectfully submitted that it is in the best interest of justice that an expedited hearing should be granted in this matter, and that the matter be heard on Wednesday, March 14, 1990 at 10:00 a.m., or at such other earlier time as the Court may fix.

Respectfully submitted,

/s/ M. Shawn McMurray
EDWARD F. KOHNKE, IV, Esq.
#7824
JOSEPH N. MOLE, Esq.
#09538
M. SHAWN MCMURRAY, Esq.
#1240
LEMLE & KELLEHER
2100 Pan-American Life Center
601 Poydras Street
New Orleans, LA 70130
Telephone: (504) 586-1241
Attorneys for Plaintiff

---

[1] See letter of March 2, 1990, a copy of which is attached hereto and marked for identification as Exhibit "A".

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 6 day of March, 1990, served a copy of this foregoing pleading upon counsel for all parties to this proceeding by hand delivery.

/s/ M. Shawn McMurray
M. SHAWN MCMURRAY

EXHIBIT "A"

McGLINCHEY, STAFFORD, MINTZ,
CELLINI & LANG, PC
643 Magazine Street
New Orleans, LA. 70130-3477
(504) 586-1200

March 2, 1990

Mr. Joseph N. Mole
Lemle & Kelleher
21st Floor
601 Poydras Street
New Orleans, Louisiana 70130-6097

Re: Zapata Gulf Marine Corporation v. Puerto Rico Maritime Shipping Authority, *et al.*, Civil Action No. 86-2911, U.S.D.C. Eastern District of Louisiana Our Ref. 8241-01-6

Dear Joe:

As I said in open Court this afternoon, I would be willing to voluntarily dismiss our counterclaims in the captioned litigation, if you are willing to accept my proposal concerning the bond requirements for appeal. I understand that you will consult with your client regarding this offer, and I would appreciate hearing from you on it as soon as possible.

In the event we cannot reach an agreement on the counterclaims, you indicated that you would file a motion to dismiss them, and ask for an expedited hearing on the motion. Please be advised that we will object to an expedited hearing of this motion because, given the compulsory time constraints for filing our post-trial motions, it would be unduly burdensome to require us to respond to a motion on the counterclaims within the same time frame.

By copy of this letter to Judge Mentz, we are simultaneously advising the Court that, if you should seek an expedited hearing on a motion to dismiss the counterclaims, then we wish to be given an opportunity to be heard on whether an expedited hearing should be held.

Sincerely,

/s/ Dando B. Cellini
DANDO B. CELLINI

DBC/jp

cc: The Hon. Henry A. Mentz, Jr.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-2911

SECTION "I" MAG. DIV. (6)

ZAPATA GULF MARINE CORPORATION assignee of
Robert E. Brizendine of the Chapter 7 estate
of American Caribe Lines, Inc.,
Plaintiff

versus

PUERTO RICO MARITIME SHIPPING AUTHORITY;
SEA-LAND SERVICE, INC.; AND
TRAILER MARINE TRANSPORT CORPORATION,
Defendant

MOTION FOR ENTRY OF RULE 54(B) JUDGMENT

NOW INTO COURT, through undersigned counsel, comes Plaintiff, Zapata Gulf Marine Corporation, which moves this Court to enter a Rule 54(b) final judgment with respect to the jury verdict rendered against Defendant, Trailer Marine Transport Corporation, on February 23, 1990 and March 2, 1990, in the form of judgment attached hereto and marked for identification as Exhibit "A", for the reasons set forth in the memorandum in support hereof.

Respectfully submitted,

/s/ M. Shawn McMurray
EDWARD F. KOHNKE, IV, ESQ.
#7824
JOSEPH N. MOLE, ESQ.
#09538
M. SHAWN MCMURRAY, ESQ.
#1240
LEMLE & KELLEHER
2100 Pan-American Life Center
601 Poydras Street
New Orleans, LA 70130
Telephone: (504) 586-1241
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 6 day of March, 1990, served a copy of this foregoing pleading upon counsel for all parties to this proceeding by hand delivery.

/s/ M. Shawn McMurray
M. SHAWN MCMURRAY

EXHIBIT "A"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-2911

SECTION "I" MAG. DIV. (6)

ZAPATA GULF MARINE CORPORATION assignee of
Robert E. Brizendine of the Chapter 7 estate
of American Caribe Lines, Inc.,
Plaintiff

versus

PUERTO RICO MARITIME SHIPPING AUTHORITY;
SEA-LAND SERVICE, INC.; and
TRAILER MARINE TRANSPORT CORPORATION,
Defendant

JUDGMENT

This captioned matter came on for trial before the Court and a jury, Honorable Henry A. Mentz, Jr., District Judge presiding. The issues having been duly tried, and the jury having duly rendered its verdicts of liability and on damages;

IT IS ORDERED AND ADJUDGED that the Plaintiff, Zapata Gulf Marine Corporation, recover of the Defendant, Trailer Marine Transport Corporation, the sum of $42 million ($14 million damages trebled), together with attorney's fees in an amount to be set by the Court, the Plaintiff's costs of action in an amount to be set by the Court, together with interest in an amount and from a date to be set by the Court.

IT IS FURTHER ORDERED that this Judgment be entered as a final judgment under Rule 54(b) of the Federal Rules of Civil Procedure, and the clerk is directed to enter such judgment forthwith.

It is expressly determined by this Court that there is no just reason for delay in the entry of this judgment until final determination of all of the issues involved in the above-entitled action.

New Orleans, Louisiana this —— day of ————, 1990.

HONORABLE HENRY A. MENTZ, JR.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-2911

SECTION "I" MAG. DIV. (6)

ZAPATA GULF MARINE CORPORATION assignee of
Robert E. Brizendine of the Chapter 7 estate
of American Caribe Lines, Inc.,
Plaintiff

versus

PUERTO RICO MARITIME SHIPPING AUTHORITY;
SEA-LAND SERVICE, INC.; and
TRAILER MARINE TRANSPORT CORPORATION,
Defendant

MEMORANDUM IN SUPPORT OF MOTION FOR RULE 54(B) JUDGMENT

MAY IT PLEASE THE COURT:

Rule 54(b) of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim . . ., the court may direct the entry of a final judgment as to one or more but fewer than all of the claims . . . only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment . . .

Title 28, U.S.C. Rule 54(b), Federal Rules of Civil Procedure.

Following the rendering of the jury verdict on March 2, 1990, the Court was prepared to enter a final judgment on the jury's verdict, and requested that Plaintiff's counsel submit a judgment. However, there remain outstanding counterclaims and third-party demands made by Defendant, Trailer Marine Transport Corporation ("TMT"), which had been previously severed and stayed by the Court. Of course, Plaintiff contends that these are frivolous—particularly in light of the jury's verdicts in this matter. Nevertheless, the Defendant has refused to voluntarily dismiss its counterclaims and has also refused to consent to an expedited hearing on a motion to dismiss the counterclaims.[1]

The reason for TMT's refusal to dismiss its counterclaims is obvious: every day that entry of judgment is delayed is costing Plaintiff the amount of approximately $10,000.00 in post-judgment interest.[2] The prejudice to Plaintiff is obvious. This is precisely the situation that Wright, Miller and Kane addressed in the following discussion concerning Rule 54(b):

> . . . [I]t may seem just to make a Rule 54(b) certification so that the party [plaintiff] may have the immediate benefit of the recovery he has been awarded providing that doing so does not prejudice the opposing party. The entry of the judgment will enable him to initiate the process of collecting the award that already has been made. As noted by the Supreme Court in the Curtiss-Wright case, delay in being able to execute on a judgment may result in

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[1] See letter from counsel for TMT, a copy of which is attached hereto and marked for identification as Exhibit "A".

[2] The Antitrust laws do not allow assessment of prejudgment interest on the trebled damage figure. The Court has discretion to allow prejudgment interest on the *untrebled* damage figure, but only if certain findings are made. See 15 U.S.C. § 15(a). Even if prejudgment interest is awarded, the difference between that and postjudgment interest on the entire judgment is enormous.

> serious economic prejudice to the judgment winner. And, if the possibility of this prejudice is high, the *trial judge cannot refuse to certify the judgment* solely on the ground that the remaining claims eventually may be set off against the judgment . . .[3]

In this case, TMT cannot even argue set-off, in view of the frivolousness of its counterclaims. It has *no* legitimate argument to oppose certification.

Under the circumstances, there is not only no just reason for delay in entering a 54(b) judgment on the jury's verdicts of February 23 and March 2, but it would be a travesty of justice to allow Defendant to postpone the day of reckoning by virtue of its frivolous counterclaims.

It is respectfully submitted that the Court should, without delay, issue a Rule 54(b) judgment against TMT in the amount of $42 million ($14 million trebled), plus attorney's fees and costs to be later determined by the Court, together with interest as determined by the Court.

Respectfully submitted,

/s/ M. Shawn McMurray
EDWARD F. KOHNKE, IV, ESQ.
#7824
JOSEPH N. MOLE, ESQ.
#09538
M. SHAWN MCMURRAY, ESQ.
#1240
LEMLE & KELLEHER
2100 Pan-American Life Center
601 Poydras Street
New Orleans, LA 70130
Telephone: (504) 586-1241
Attorneys for Plaintiff

---

[3] Vol. 10, FEDERAL PRACTICE AND PROCEDURE, Wright, Miller & Kane, § 2659 (footnotes omitted; emphasis supplied), citing *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 100 S.Ct. 1460 (1980).

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 6 day of March, 1990, served a copy of this foregoing pleading upon counsel for all parties to this proceeding by hand delivery.

/s/ M. Shawn McMurray
M. SHAWN MCMURRAY

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action Number: 86-2911

SECTION: "I" (6)

ZAPATA GULF MARINE CORPORATION, assignee of Robert E. Brizendine of the Chapter 7 estate of American Caribe Lines, Inc.

versus

PUERTO RICO MARITIME SHIPPING AUTHORITY; SEA-LAND SERVICE, INC.; and TRAILER MARINE TRANSPORT CORPORATION

JUDGMENT

[Entered Mar. 22, 1990]

This captioned matter came on for trial before the Court and a jury, Honorable Henry A. Mentz, Jr., District Judge presiding. The issues having been duly tried, and the jury having duly rendered its verdicts of liability and on damages;

IT IS ORDERED AND ADJUDGED that the Plaintiff, Zapata Gulf Marine Corporation, recover of the Defendant, Trailer Marine Transport Corporation, the sum of $41 million, together with attorney's fees in an amount to be set by the Court, the Plaintiff's costs of action in an amount to be set by the Court, together with interest from March 20, 1990 until paid.

IT IS FURTHER ORDERED that this Judgment be entered as a final judgment under Rule 54(b) of the

Federal Rules of Civil Procedure, and the clerk is directed to enter such judgment forthwith.

It is expressly determined by this Court that there is no just reason for delay in the entry of this judgment until final determination of all of the issues involved in the above-entitled action.

New Orleans, Louisiana, this 20th day of March, 1990.

/s/ Henry A. Mentz, Jr.
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-2911

SECTION "I"

MAGISTRATE (6)

ZAPATA GULF MARINE CORPORATION, assignee of Robert E. Brizendine of the Chapter 7 estate of American Caribe Lines, Inc.

versus

PUERTO RICO MARITIME SHIPPING AUTHORITY; SEA-LAND SERVICE, INC.; and MARINE TRANSPORT CORP.

PLAINTIFF'S MOTION FOR ENTRY OF RULE 54(B) JUDGMENT and DEFENDANT TMT'S MOTION TO STAY ENFORCEMENT OF JUDGMENT AND FOR APPROVAL OF ALTERNATE SECURITY, heard before The Honorable Henry A. Mentz, Jr., on Tuesday, March 20, 1990.

For Zapata Gulf Marine Corporation:

LEMLE, KELLEHER, KOHLMEYER, DENNERY, HUNLEY, MOSS & FRILOT
(By: EDWARD F. KOHNKE, IV, ESQ.
JOSEPH N. MOLE, ESQ.)

For Trailer Marine Transport Corporation:
McGLINCHEY, STAFFORD, MINTZ, CELLINI & LANG
(By: DANDO B. CELLINI, ESQ.
VICTORIA K. McHENRY, ESQ.)

Also Present:

MR. KEVIN O'ROURKE

* * * *

THE COURT: * * *

All right. Let me go ahead and rule on 54(b). This is our first motion for entry of the 54(b).

Final judgment may be entered as to some, but not all, claims or parties if there is an express determination that there is no just reason for delay and a direction for such entry made by the trial court. The prerequisites for entry of final judgment under the Federal Rules Civil Procedure 54(b) as to one or more, but fewer than all, claims or parties are that (1) more than one claim for relief be presented in the action; (2) the claim or claims be finally decided; and (3) there is no just reason for delaying the entry of final judgment together with an express direction that judgment be entered. All three prerequisites must be proven by the mover before the District Court can enter the final judgment.

Now, Mr. Mole, do you want to introduce any evidence or anything on this motion or argument?

MR. MOLE: Your Honor, my argument for the entry of judgment is set forth in our brief, and we think there is no just reason for delay. And we think the delay of four years in getting to trial and getting a jury verdict makes it unjust to do anything else.

THE COURT: Well, we have considered your motion and, of course, the opposition too.

MS. McHENRY: We have our opposition too, Your Honor, based on the fact that we don't—Vicky McHenry for TMT—our opposition is based on the fact that we don't think there is essentially more than one claim for relief. We feel that our counterclaims are inextricably intertwined with the main claim, and our defense is there too, and we've always taken that position. We took that position when the plaintiff's moved for separate trial of our claims. We opposed it based on the fact that they were inextricably intertwined, and we're taking the same position now. And we've pointed out to the Court the Supreme Court case which says you have to make a

determination that the adjudicated claims and the unadjudicated claims are in fact truly separable. It has always been our position that they were not, and we're just maintaining that position now with the added concern that this question goes to the jurisdiction of the appellate court when they will get our appeal of this matter. And we're just concerned that they may look at this sua sponte—certainly no one is going to bring it up to them—and may determine that the 54(b) was improvidently entered and bounce the case back, a result which we don't believe benefits anyone, but that was the basis of our opposition, Your Honor.

THE COURT: Thank you.

MR. MOLE: If I may briefly address this now: TMT argues that the counterclaim is inextricably intertwined with the main claim, and I think the only argument seen is the same as Gertrude Stein's "A rose is a rose is a rose." There's been no explanation as to how they are intertwined because I think they are not. This anti-trust case is about events that took place in 1984. The counterclaim basically is about events that took place in 1986 in filing this lawsuit. They're certainly related, but they are not intertwined insofar as the Fifth Circuit's consideration of legal issues. The Rule 54(b) does direct—does allow a judge to enter judgment as to the finding of no just reason for delay.

I think the history of the counterclaim in this case speaks for itself. In 1989, in April, when TMT sought to have the counterclaim unstayed and unsevered, the Court, in the minute entry dated April 20, noted that on that subject the defendants have been the source of numerous delays in this case. And then again last year, the Court noted that trial was delayed by defendant's charge of sham litigation which first arose in Rule 11 allegations that were made against my firm.

The counterclaim Paragraph 30 alleges this is a meritless anti-trust suit. In Paragraph 32, it alleges that this is a sham litigation. Paragraph 34 alleges that this was

an unmeritorious lawsuit and groundless. Now we have a jury verdict, Your Honor, which I think settles all those things, but the force to litigate the counterclaim is the price for getting the final judgment, I think, would be unjust.

The *Curtiss-Wright* case, which was a Supreme Court decision in 1980, involved exactly the same situation, where there's a remaining counterclaim in a lawsuit. The Supreme Court held that the question in cases like this, where there's a claim that is resolved and the counterclaim remaining, is peculiar within the province of the trial judge to determine whether or not it should be made final, in that it is very difficult and an appeals court shouldn't look behind the trial judge's decision, because the trial judge knows the equities of the case and what has happened during the case. I think this Court is especially aware of what happened over the last four years, and the delays that have taken place, and the equities weigh heavily in favor of an entry of judgment. I think the whole record supports that, Judge.

THE COURT: All right. Thank you both.

The court must balance the traditional policy against piecemeal review under the "single judicial unit" rule with the untoward effects which can occur when decisions final as to some claims and some parties cannot be entered until the litigation is final as to all claims and all parties. Accordingly, a Rule 54(b) judgment should not be granted routinely or as a courtesy to counsel, but only if there exists some danger or hardship or injustice if the entry of judgment is delayed and which could be alleviated by an immediate appeal. The Rule 54(b) judgment should be entered only in "infrequent, harsh cases."

The main demand, the counterclaim and the third-party demands in this case do not present a single claim. There is more than one claim for relief. The facts underlying the main demand are separate from the counterclaim and the third-party demand. The main demand was

based on anti-trust violations causing the demise of AmCar, while the counterclaim and the third-party demand allege that Zapata's suit was not genuinely motivated by a sincere desire for judicial relief. Whether Zapata and others entered a conspiracy to bring this suit for improper purposes involves parties and facts unrelated to "why AmCar failed," which was the focus of the past several weeks of trial. The counterclaim and the third-party demands focus on events subsequent to AmCar's demise. The fact that some facts may overlap does not necessarily mean that they amount to a single claim. The court finds that the counterclaim and third-party demand require proof of facts distinct from those addressed in trial of the main demand. The counterclaim and third-party demands also allege that Zapata's suit is meritless, but that contention is mooted by the jury's verdict in favor of Zapata.

The plaintiff has shown that there is no just reason for delaying the entry of final judgment on the jury's verdict. The enormity of the verdict together with the fact that interest cannot accrue until entry of judgment presents an unusual situation. Therefore, the court will grant plaintiff's motion for a 54(b) judgment.

* * * *

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-2911

SECTION "I"

MAG. DIV. (6)

ZAPATA GULF MARINE CORPORATION, assignee of Robert E. Brizendine of the Chapter 7 estate of American Caribe Lines, Inc.,

Plaintiff

Versus

PUERTO RICO MARITIME SHIPPING AUTHORITY; SEA-LAND SERVICE, INC.; and TRAILER MARINE TRANSPORT CORPORATION,

Defendant

MOTION FOR PREJUDGMENT INTEREST PURSUANT TO SECTION 4 OF THE CLAYTON ACT

NOW INTO COURT, through undersigned counsel, comes Plaintiff, Zapata Gulf Marine Corporation, which prays that this Court award Plaintiff prejudgment interest on its actual damages of $14 million, pursuant to Section 4 of the Clayton Antitrust Act, 15 U.S.C. § 15, for the reasons set forth in the accompanying memorandum.

Respectfully submitted,

/s/ M. Shawn McMurray
EDWARD F. KOHNKE, IV, Esq.
#7824
JOSEPH N. MOLE, Esq. #09538
M. SHAWN MCMURRAY, Esq.
#1240
Lemle & Kelleher
2100 Pan-American Life Center
601 Poydras Street
New Orleans, LA 70130
Telephone: (504) 586-1241
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 26th day of March, 1990. served a copy of this foregoing pleading upon counsel for all parties to this proceeding by hand or by United States mail, properly addressed and first class postage prepaid.

/s/ M. Shawn McMurray
M. SHAWN MCMURRAY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-2911

SECTION "I"

MAG. DIV. (6)

ZAPATA GULF MARINE CORPORATION, assignee of Robert E. Brizendine of the Chapter 7 estate of American Caribe Lines, Inc.,

Plaintiff

Versus

PUERTO RICO MARITIME SHIPPING AUTHORITY; SEA-LAND SERVICE, INC.; and TRAILER MARINE TRANSPORT CORPORATION,

Defendant

NOTICE

TO: TRAILER MARINE TRANSPORT CORPORATION,
Through its Attorneys of Record,
Dando B. Cellini, Esq.
McGlinchey, Stafford, Mintz, Cellini & Lang
643 Magazine Street
New Orleans, LA 70130

PLEASE TAKE NOTICE that the Plaintiff, Zapata Gulf Marine Corporation, will bring on for hearing the attached Motion for Prejudgment Interest under Section 4 of the Clayton Act for hearing before the Honorable Henry A. Mentz, Jr., United States District Judge, Eastern District of Louisiana, at the United States Courthouse, Fourth Floor, 500 Camp Street, New Orleans, Louisiana 70130, on Wednesday, the 11th day of April,

1990 at 10:00 a.m. or as soon thereafter as counsel may be heard, at which time you may attend and participate as permitted by law.

New Orleans, Louisiana this 26 day of March, 1990.

/s/ M. Shawn McMurray
EDWARD F. KOHNKE, IV, ESQ. #7824
JOSEPH N. MOLE, ESQ. #09538
M. SHAWN MCMURRAY, ESQ. #1240
LEMLE & KELLEHER
2100 Pan-American Life Center
601 Poydras Street
New Orleans, LA 70130
Telephone: (504) 586-1241
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 26 day of March, 1990, served a copy of this foregoing pleading upon counsel for all parties to this proceeding by hand or by United States mail, properly addressed and first class postage prepaid.

/s/ M. Shawn McMurray
M. SHAWN MCMURRAY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-2911

SECTION "I"

MAG. DIV. (6)

ZAPATA GULF MARINE CORPORATION, assignee to Robert E. Brizendine of the Chapter 7 estate of American Caribe Lines, Inc.,

Plaintiff

versus

PUERTO RICO MARITIME SHIPPING AUTHORITY; SEA-LAND SERVICE, INC.; AND TRAILER MARINE TRANSPORT CORPORATION,

Defendant

MEMORANDUM IN SUPPORT OF MOTION FOR PREJUDGMENT INTEREST UNDER SECTION 4 OF THE CLAYTON ACT

MAY IT PLEASE THE COURT:

Section 4 of the Clayton Antitrust Act, 15 U.S.C. § 15, provides in pertinent part as follows:

> The *court may award under this Section*, pursuant to a motion by such person promptly made, *simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim* under the antitrust laws *and ending on the date of judgment*, or for any shorter period therein, if the court finds that the award of

such interest for such period is just in the circumstances. In determining whether an award of interest under this Section for any period is just in the circumstances, the court shall consider only—

(1) *Whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay*, or otherwise acted in bad faith;

(2) Whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) *Whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation* or increasing the cost thereof.

Title 15, United States Code, Section 15(a) (as amended 1980, 1982) (emphasis supplied).

Because the record is replete with evidence of Defendant's efforts to intentionally delay this litigation, it is respectfully submitted that this court should award the Plaintiff prejudgment interest against the Defendant, Trailer Marine Transport Corporation ("TMT").

I. DEFENDANT'S DILATORY MOTION PRACTICE

Plaintiff filed the Complaint along with document requests on July 10, 1986. TMT was served on July 11, 1986. On August 20, 1986, after receiving an extension of time to respond, TMT filed a motion to dismiss under Rule 12(b)(6) of Fed. R. Civ. P. In this first substantive pleading, TMT demonstrated how it would conduct its defense; it suggested that Plaintiff's counsel had violated

Rule 11 of the Fed. R. Civ. P. by merely filing such an allegedly frivolous lawsuit. The other defendants at the time, Puerto Rico Maritime Shipping Authority ("PRMSA") and Sea-Land Services, Inc. ("Sea-Land") also filed 12(b)(6) motions.

The Court denied all three motions to dismiss on November 12. TMT, Sea-Land and PRMSA then moved to certify the issue pursuant to 28 U.S.C. § 1292(b), and to stay all proceedings pending the Fifth Circuit's decision. This strategy stayed the progress of the litigation for nearly three months, until the Fifth Circuit denied the Defendants' petition for leave to appeal on February 3, 1987.

Rather than proceed with discovery in a proper and orderly manner, all three Defendants filed second motions to dismiss [1] seeking referral to the ICC and another stay —delaying matters another two months until the Court denied the motions on April 1, 1987.

These tactics postponed the joining of issue and the start of discovery for nearly a year. Finally, on June 10, 1987 the Court set cut-off dates for discovery and scheduled the trial for October 31, 1988.

In the course of discovery, Plaintiff was required to file three motions to compel against TMT and an equal number against Sea-Land before obtaining the documents it requested simultaneously with the filing of the Complaint. Meanwhile, PRMSA moved for summary judgment on the ground of state action immunity in October of 1987, which the Court granted on February 26, 1988. TMT and Sea-Land both then moved for summary judgment on the same grounds as PRMSA, and at the same time moved once again to stay proceedings. This delayed matters for another month, until the Court denied their motions on March 18, 1988. TMT and Sea-Land there-

[1] This was in violation of the Federal Rules of Civil Procedure, which do not authorize second 12(b)(6) motions.

upon moved for a third time to certify the issue to the Court of Appeals, and for a stay. The motion for certification was denied on April 13, 1988. These state action immunity motions effectively prevented the start of discovery on the merits until mid-1988, almost two years after suit was filed.

The next substantive motions that the Defendants urged were two motions for summary judgment, both filed on August 29, 1989. After Plaintiff filed oppositions to these two motions on September 25, 1989, each of the Defendants filed two memoranda in reply to the Plaintiff's opposition on October 6, 1989. When the Court granted the Defendants' motion for partial summary judgment, the Defendants filed a new and unauthorized motion for partial summary judgment, as well as three motions to reconsider. The last of the motions to reconsider was filed on January 5, 1990, when the trial on the merits was to begin on January 8, 1990; the Court rejected it as "untimely".

With such a history of motion practice, it is no accident that although the case in this matter was filed on July 10, 1986 and the first trial date was October 31, 1988, trial did not begin until January 8, 1990.

II. DEFENDANTS' RULE 11 ALLEGATIONS

As set forth above, on June 10, 1987, the Court set its first trial date—October 31, 1988. Immediately thereafter, Defendants instigated a number of status conferences with the Court where they expressed their "concerns" that the Plaintiff had violated Rule 11 in filing the Complaint, and they noticed ten depositions between October 23, 1987 and October 28, 1987—when the Plaintiff was conducting discovery incident to PRMSA's motion for summary judgment.

The court ordered all discovery pertaining to Defendants' Rule 11 suspicions to cease on February 15, 1988.

Between November 4, 1987 and February 15, 1988, Defendants refused to engage in any discovery on the merits, and their sole effort at "Rule 11 discovery" consisted of serving interrogatories and requests for production on Plaintiff which sought all of the Plaintiff's counsel's investigation files. In response to Plaintiff's objections, the Court conducted an *in camera* review of all of Plaintiff's counsel's work product and attorney/client documents. The Court determined that these documents incontrovertibly established the sham nature of Defendants' Rule 11 inquiry:

> [T]he documents [which the court reviewed] do not support defendants' speculations about a Rule 11 violation and, in fact, would soundly defeat any such claim were it to be brought.
>
> The documents produced establish without doubt that there was an extensive and thorough inquiry into the facts and law before instituting this suit. The research and investigation conducted amply support plaintiff's decision to bring this suit, despite the certain recognized risks. There is absolutely no evidence of a Rule 11 violation.[2]

III. THE COUNTERCLAIMS, MOTION TO RECUSE AND OTHER ATTEMPTS TO CONTINUE THE TRIAL

Having failed in their Rule 11 sham, and having failed in their groundless motion for summary judgment on state action grounds, the Defendants were faced with a trial date approaching on October 31, 1988. They thus prepared third party complaints and counterclaims—on the ground that *this* suit was frivolous—against Plaintiff, Zapata Gulf Marine Corporation, and numerous third parties: Luis A. Ayala Colon Sucrs., Enron Corporation,

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[2] Minute Entry, March 9, 1989, a copy of which is attached hereto and marked for identification as Exhibit "A".

Houston Natural Gas Corporation, Zapata Corporation, Marine Transportation Services SeaBarge, Inc. and SEL Maduro (Florida), Inc.[3] Because of these new suits, and because of their alleged inability to timely complete discovery (after declining to proceeding with legitimate discovery for three months while they pursued their Rule 11 sham), the Defendants sought and received a continuance of the trial date until Monday, March 20, 1989. Plaintiff opposed the Defendants' request for a continuance.[4]

The court thereafter allowed TMT and Sea-Land to amend their pleading to file and serve the counterclaims and third-party claims. However, on June 21, 1988, and June 28, 1988, the Court severed them and stayed all discovery pertaining to these counterclaims and third-party claims in order to preserve the March 1989 trial date. Nevertheless, two months before the scheduled trial, the Defendants again requested a continuance of the trial date "on the ground that there is insufficient time to complete discovery and present Rule 56 motions and motions in limine to the Court." The Court continued the trial until November 6, 1989, although "Plaintiff's counsel strenuously opposed the motion." [5]

Three months later, Defendants decided to use an alleged difficulty in obtaining discovery from SeaBarge, one of the third-party defendants, to resurrect their counterclaims. On April 20, 1989, the Court refused to lift the stay relative to the Defendants' third-party demands and counterclaims, stating in pertinent part:

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[3] These were the parties joined by TMT; Sea-Land did not join in the suit against Luis A. Ayala Colon, Marine Transportation Services Sea-Barge, Inc. and SEL Maduro.

[4] This was the first continuance. See Minute Entry of April 22, 1988, a copy of which is attached hereto and marked for identification as Exhibit "B".

[5] This was the second continuance. See Minute Entry of January 17, 1989, a copy of which is attached hereto and marked for identification as Exhibit "C".

> [i]f the court were to lift the stay order, the progress of this litigation would be disrupted. . . . Defendants have been the source of numerous delays in this case, which is now set for trial on November 6, 1989, and the court will not permit another continuance.[6]

It appeared at that point that all of Defendants' efforts to postpone the inevitable trial had failed; the Court recognized Defendants' dilatory tactics for what they were and was not going to countenance any more continuances. The Defendants then pursued another tactic: in June of 1989, TMT filed a motion to recuse the Court. The Court denied this motion for recusal on July 19. In giving its oral reasons, the Court stated in pertinent part as follows:

> . . . the court has carefully reviewed the joint motion for recusal and finds it is completely without merit.
>
> It is important to note for the record that defendants' briefs are replete with mischaracterizations which in many instances the court can only construe as intentional since defendants have been informed to the contrary . . .
>
> Defendants have absolutely no evidence to support their allegation that the court has reviewed and/or inspected the memorandum in issue. Defendants' position is made even more baseless by the fact that they have tendered the memorandum to the court on two occasions . . .
>
> The court has previously noted in its Minute Entry of April 20, 1989, that there is a history of delays in this case, primarily on the part of the present movers. According to defendants' reply brief, they

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[6] See Order and Reasons, Honorable Henry A. Mentz, Jr., April 20, 1989, a copy of which is attached hereto and marked for identification as Exhibit "D".

> view the court's opinion about the delays in this case as 'gratuitous'. The court hopes that the defendants will now fully appreciate that the court's orders containing opinions about delay problems are not gratuitous.
>
> Although the record of delays will speak for itself, the court will note for the present that the case has been continued several times upon defendants' request. Defendants obtained a stay for many months to appeal an interlocutory ruling, and defendants delayed discovery on the merits to pursue the discovery on the sham litigation issue which discovery precipitated the fruitless in camera review of Mr. Mole's files.[7]

Not content with the Court's denial of their Motion to recuse, the Defendants sought review from the Fifth Circuit for the third time, this time seeking a writ of mandamus. The Fifth Circuit denied their Petition on August 9, 1989. Meanwhile, because of delays in concluding discovery necessitated by the fact that Defendants' expert, Dr. Frederick Dunbar submitted a supplemental expert report in violation of the Court's deadlines, the trial was continued again, until November 13, 1989.[8]

The Defendants filed two motions for summary judgment on August 29, 1989 and four reply memoranda to Plaintiff's opposition on October 6, 1989. Subsequently, the Court permitted defense counsel to file a second reply brief after oral argument on the joint motion for summary judgment. When the Court allowed Plaintiff's counsel an opportunity to file a reply brief as well, Defendants sent a letter to the Court dated October 25, 1989, essentially complaining that the Plaintiff was getting a "special dispensation" by being allowed to file a reply brief.

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[7] Oral Reasons—transcription of the proceeding held on Wednesday, July 19, 1989, a copy of which is attached hereto and marked for identification as Exhibit "E", at Pages 5, 7, and 13.

[8] This was the third continuance.

By Minute Entry under date of October 31, 1989, the Court indicated its displeasure: it realized "that the ground is being laid for a motion for continuance and additional allegations of some type of impropriety", in view of the fact that "this litigation has been fraught with arguments and motions, many of which have been frivolous." [9]

The Court was correct. The Defendants obtained another continuance of the trial date—until January 2, 1990.[10] Subsequently, in order to accommodate the personal schedule of one of Defendants' counsel, the trial was again continued until January 8, 1990.[11]

Sea-Land and the Plaintiff settled their differences on the eve of trial. TMT's delaying tactics, however, continued—on February 5, 1990, i.e., one month into the trial, it filed a motion to exclude the expert testimony of Dr. Steven Jizmagian, or alternatively "to adjourn trial for one day in order to allow defendant to depose Dr. Jizmagian." TMT obtained the one-day adjournment—further lengthening these proceedings.

IV. CONCLUSION

This complaint was filed on July 10, 1986. A final verdict was rendered on March 2, 1990. The process took nearly four years because of the dilatory tactics of TMT: five continuances of trial dates, three months to stay the proceedings, two trips to the Fifth Circuit, a motion to recuse, three months of a Rule 11 investigation, two 12 (b) (6) motions to dismiss, four summary judgment motions, seven frivolous counterclaims and third-party claims, and refusals to respond to discovery so as to require three motions to compel. TMT has never stopped in its efforts to delay this litigation and increase Plain-

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[9] Minute Entry, October 31, 1989, a copy of which is attached hereto and marked for identification as Exhibit "F".

[10] This was the fourth continuance.

[11] This was the fifth continuance.

tiff's costs. If ever a case was appropriate for the imposition of prejudgment interest, this is the case.

It is respectfully submitted that prejudgment interest should be awarded to Plaintiff in this proceeding.

Respectfully submitted,

/s/ M. Shawn McMurray
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JOSEPH N. MOLE, ESQ. #09538
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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 26th day of March, 1990, served a copy of this foregoing pleading upon counsel for all parties to this proceeding by hand or by United States Mail, properly addressed and first class postage prepaid.

/s/ M. Shawn McMurray
M. SHAWN MCMURRAY

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action Number: 86-2911

SECTION "I" (6)

MINUTE ENTRY
AUGUST 23, 1990
MENTZ, J.

ZAPATA GULF MARINE CORPORATION, ETC.

versus

PUERTO RICO MARITIME SHIPPING AUTHORITY, ET AL.

[Entered Aug. 24, 1990]

This antitrust case was tried to a jury over several weeks. The issues of liability and damages were bifurcated. On February 23, 1990, the jury found that defendant, TMT, was liable for the following violations of federal antitrust laws: 1) a conspiracy in restraint of trade in violation of 15 U.S.C. § 1; 2) monopolization in violation of 15 U.S.C. § 2; 3) attempt to monopolize in violation of 15 U.S.C. § 2; and conspiracy to monopolize in violation of 15 U.S.C. § 2. On March 2, 1990, the jury returned a verdict awarding plaintiff $14,000,000.00 in actual damages.

The Court addresses herein the defendant, TMT's, Motion for Judgment Notwithstanding the Verdict and Alternatively for New Trial. Defendant's motion re-urges the arguments set forth in its motions for directed ver-

dict on which the court reserved ruling. In essence, defendant's position is that the evidence is legally insufficient to support liability on the plaintiff's claims under Section 1 and 2 of the Sherman Act. In addition, defendant argues that it is entitled to a JNOV or new trial based on the doctrine of illegality, lack of standing, and because the evidence does not support the jury's verdict on damages.

This case was fully and fairly tried over several weeks. The jury's verdicts on both liability and damages are supported by substantial evidence. With respect to defendants' arguments based on the doctrine of illegality and lack of standing, these matters were addressed by the court in pre-trial rulings. Defendant has not persuaded the court that the pre-trial rulings were in error or that a JNOV or new trial should be granted.

Accordingly,

IT IS ORDERED that defendant's Motions for Directed Verdict [1] and Motion for Judgment Notwithstanding the Verdict or Alternatively for New Trial are DENIED.

/s/ Henry A. Mentz, II

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[1] Defendant's motions for directed verdict are as follows:

1) Motion for Directed Verdict on Plaintiff's Claims of Conspiracy in Violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2;

2) Motion for Directed Verdict on Plaintiff's Claim of Unilateral Monopolization in Violation of Section 2;

3) Motion for Directed Verdict on Plaintiff's Claim of Attempted Monopolization in Violation of Section 2 of the Sherman Act, 15 U.S.C. § 2;

4) Motion for Directed Verdict on Plaintiff's Claim of Predatory Pricing;

5) Motion for Directed Verdict on Plaintiff's Claims for Lack of Antitrust Injury;

6) Motion for Directed . erdict Based on the Ground of Illegality.

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-2911

SECTION "I"
JUDGE MENTZ

Magistrate Division 6
MAGISTRATE MOORE

ZAPATA GULF MARINE CORPORATION, ASSIGNEE OF ROBERT E. BRIZENDINE, TRUSTEE OF THE CHAPTER 7 ESTATE OF AMERICAN CARIBE LINES, INC.,

Plaintiff,

Versus

PUERTO RICO MARITIME SHIPPING AUTHORITY; SEA-LAND SERVICE, INC.; and TRAILER MARINE TRANSPORT CORPORATION,

Defendants.

NOTICE OF APPEAL

Notice is hereby given that Trailer Marine Transport Corporation, defendant above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on the 22nd day of March, 1990, and the order denying said defendant's motions for directed verdict and motion for judgment notwithstanding the verdict or for a new trial, entered in this action on the 24th day of August, 1990.

Respectfully submitted this 21st day of September, 1990.

Of Counsel:
McGlinchey, Stafford, Cellini & Lang, PC

/s/ D. B. Cellini
DANDO B. CELLINI, T.A. (3955)
J. FORREST HINTON (1418)
VICTORIA K. MCHENRY (10568)
ALEXANDER M. MCINTYRE, JR. (17053)
643 Magazine Street
New Orleans, Louisiana 70130
Telephone (504) 586-1200
Attorneys for Defendant
Trailer Marine Transport Corporation

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Notice of Appeal have been served, by hand or by United States Mail, postage prepaid, upon all counsel of record in these proceedings this 21st day of September 1990.

/s/ D. B. Cellini
DANDO B. CELLINI

APPENDIX I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-2911

SECTION "I"

[Entered Oct. 15, 1990]

MINUTE ENTRY
OCTOBER 12, 1990
MENTZ, J.

ZAPATA GULF MARINE CORP., ETC.

versus

PUERTO RICO MARITIME SHIPPING AUTHORITY, ET AL.

A status conference was held this date in the above-captioned matter.

PRESENT: Joe Mole, M. Shawn McMurray, and D.W. Casserleigh for Plaintiff, Zapata
D.B. Cellini for Defendant, TMT

The court and counsel discussed Plaintiff's Motion for Attorneys' Fees.

Accordingly,

IT IS ORDERED that the parties shall jointly address the itemized claim for attorneys' fees and attempt to resolve any factual disputes. Not later than Friday, October 26, 1990, the parties shall submit any stipulations and/or additional evidence. If either party desires an evidentiary hearing, it should be requested at that time.

/s/ Henry A. Mentz, Jr.

APPENDIX J

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action Number 86-2911

SECTION "I" (6)

ZAPATA GULF MARINE CORPORATION, ETC.

versus

PUERTO RICO MARITIME SHIPPING AUTHORITY, ET AL.

ORDER AND REASONS

[Entered Oct. 15, 1990]

The court addresses here the motions of the plaintiff, Zapata Gulf Marine Corporation (Zapata), for costs and for prejudgment interest against the defendant, Trailer Marine Transport Corporation (TMT).

The plaintiff filed this private antitrust suit for treble damages under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2 on July 10, 1986. On January 8, 1990, approximately three and one-half years later, the parties presented the case to the jury. After an eight-week trial, the jury returned a verdict in favor of the plaintiff for fourteen million dollars in actual damages.

Title 15 U.S.C. § 15 permits a successful antitrust plaintiff to recover treble damages, costs, and attorneys fees. A plaintiff may also recover prejudgment interest in limited circumstances.[1] In accordance with the pro-

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[1] Title 15 U.S.C. § 15 provides:

(a) Amount of recovery; prejudgment interest. Except as provided in subsection (b), any person who shall be injured in

visions of § 15, the court entered judgment in favor of the plaintiff, and against TMT in the amount of $41 million dollars, together with attorneys' fees and costs. Zapata then filed a motion to fix the amount of costs and to recover prejudgment interest.[2]

I. MOTION TO TAX COSTS

Zapata seeks to recover $247,108.64 in costs, itemized as follows:

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his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings;

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost hereof.

[2] Zapata also filed a motion to fix the amount of attorneys' fees, but that matter is not addressed here.

Fees of the Clerk	$60.00
Fees for service of summons and complaint	7.00
Fees of the court reporter for daily transcripts	7,602.00
Fees of the stenographer for deposition transcripts	61,219.16
Fees for witnesses	8,353.00
Fees for exemplification and copies of papers the case	96,417.05
Fees for translation of documents	6,972.33
Costs of computer research	7,660.15
Costs of charts, models, and photographs	58,861.95
Total	$247,108.64

The award of costs is governed by 28 U.S.C. § 1920. That statute provides that the following specific items may be taxed as costs:

> (1) Fees of the clerk and marshall;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title;
>
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

TMT does not dispute Zapata's entitlement to or the amount of the fees of the Clerk, the fees for service of

summons and complaint, the witness fees, or the costs of computer research. TMT maintains that the court should not award the remaining costs because Zapata either failed to provide specific itemization and documentation or failed to show that the items are recoverable as a matter of law.

A. Fees of the Court Reporter for Daily Transcripts

Under 28 U.S.C. § 1920(2), the cost of daily transcripts may be awarded only if the copies were necessarily obtained for use in the case. *See J.T. Gibbons, Inc. v. Crawford Fitting Co.*, 760 F.2d 613, 615-16 (5th Cir.), *modified on other grounds*, 790 F.2d 1193 (1985) (en banc), *aff'd*, 482 U.S. 437, 107 S.Ct. 2494, 96 L.Ed. 2d 385 (1987); *Studiengesellschaft Kohle v. Eastman Kodak Co.*, 713 F.2d 128, 133 (5th Cir. 1983); and *Copper Liquor, Inc. v. Adolph Coors Co.*, 684 F.2d 1087, 1099 (5th Cir. 1982), *modified on other grounds*, 701 F.2d 542 (1983) (en banc), *overruled in part on other grounds, J.T. Gibbons*, 790 F.2d at 1195. Daily transcripts of trial proceedings are not customary. In this case, the parties infrequently referred to the daily transcripts during testimony. Considering that the trial lasted eight weeks, it is likely that the lawyers personnally used the daily transcripts to refresh their memories of past testimony. Any one of the lawyers sitting with trial counsel could have taken notes for that purpose. Both trial attorney's in this case are partners in large law firms with extensive staff support. Accordingly, the court finds that the daily transcripts were obtained primarily for the convenience of the lawyers and were not necessarily obtained for use in the case. *See Farmer v. Arabian Am. Oil Co.*, 379 U.S. 227, 235, 85 S.Ct. 411, 13 L.Ed.2d 248, 254 (1964); *Brumely Estate v. Iowa Beef Processors, Inc.*, 704 F.2d 1362, 1363 (5th Cir. 1983).

B. Fees of the Stenographer for Deposition Transcripts

The cost of deposition transcripts is within the parameters of § 1920(2) permitting fees of the court reporter, even though the deposition stenographer is not the official court reporter. *United States v. Kolesar*, 313 F.2d 835, 837-38 (5th Cir. 1963). Deposition costs may be recovered where all or any part of the deposition was necessary for use in the case, notwithstanding that the deposition was not introduced into evidence or used at trial in examining or impeaching witnesses. *See Nissho-Iwai Co., Ltd. v. Occidental Crude Sales, Inc.*, 729 F.2d 1530, 1533 (5th Cir. 1984); *Copper Liquor*, 684 F.2d at 1099; *Allen v. U.S. Steel Corp.*, 665 F.2d 689, 697 (5th Cir. 1982); *Ryan v. Southern Natural Gas Co.*, 1989 WL 159338 (E.D. La. Dec. 20, 1989). There is no distinction in the recovery of costs between depositions noticed by an unsuccessful litigant as opposed to a prevailing party. *See J.T. Gibbons*, 760 F.2d at 616.

In this case, the plaintiff seeks reimbursement for 56 depositions. About one-half of the people deposed were beyond the subpoena power of the court. Zapata read three depositions into the record; TMT read five into the record. At least twelve depositions were quoted in cross-examination, and in at least sixteen other depositions the deponent explained or provided documents that were introduced into evidence. The other twenty deponents were deposed by the defendants. All but four of the deponents were listed in the pre-trial order as potential witnesses. In these circumstances, the deposition transcripts were necessarily obtained for use at trial and were not merely for the convenience of trial counsel. *See J.T. Gibbons v. Crawford Fitting Co.*, 102 F.R.D. 73, 79-82 (E.D. La. 1984), *rev'd in part on other grounds*, 760 F.2d at 616.

C. Fees for Exemplification and Copies of Papers in the Case

A prevailing party may recover fees for exemplification and copies of papers "necessarily obtained for use in the case." 28 U.S.C. § 1920(4).

Zapata seeks a total of $96,345 for photocopies. In support of its claim, Zapata provided the court with thirteen columns of numbers, apparently representing the costs of photocopies made during the course of the litigation. There is no information about what was copied or how the copy was used. Zapata did not give the court any information to determine the necessity of the photocopies. As Zapata's claim for exemplification and copies of papers is essentially undocumented, the claim must be disallowed. *See Copper Liquor*, 684 F.2d at 1098-99; *Walker v. Borden, Inc.*, 115 F.R.D. 471, 473 (S.D. Miss. 1986).

D. Fees for Translation of Documents

Although there is no specific statutory provision allowing for costs of translations, the Fifth Circuit has held that translation costs may be properly taxed under § 1920(4). That statute, as discussed above, permits an award of costs for exemplification of papers necessarily obtained for use in trial. Thus, "the proper standard for the award of translation costs should also be whether they were necessarily incurred." *Studiengesellschaft Kohle*, 713 F.2d at 133.

Zapata seeks $6,972.33 as costs for the translation of the minutes of the meetings of the Board of Directors of the Puerto Rico Maritime Shipping Authority (PRMSA). PRMSA was an alleged co-conspirator with TMT. Although PRMSA was dismissed from the suit prior to trial, the court ruled that its actions could be considered in determining whether TMT entered a conspiracy to monopolize trade. Thus, the minutes were relevant to a material issue in the case. Indeed, the minutes were

used during the examination of two officers of PRMSA, Roberto Lugo and Walter Huresky. Accordingly, the court finds that the costs of translating the minutes was necessarily incurred for use in the trial.

E. Costs of Charts, Models, and Photographs

There is no statutory provision for taxing the costs of charts, models, and photographs. The law in the Fifth Circuit permits taxation of costs for demonstrative evidence only if there is pre-trial authorization by the trial court. *See Studiengesellschaft Kohle*, 713 F.2d at 113 (citing *Johns-Manville Corp. v. Cement Asbestos Products Co.*, 428 F.2d 1381, 1385 (5th Cir. 1970); *Walker*, 115 F.R.D. at 474.

Zapata claims $58,861.95 as costs for charts, models, and photographs. Zapata maintains that the costs are taxable because the pre-trial order authorized the use of that type of evidence. The pre-trial order provided:

> Plaintiff may seek to use for demonstrative purposes in opening statement, closing argument and possibly during interrogation of some witnesses, charts, graphs, models, photographs, blow-ups of documents and deposition attachments. None of the above will be offered into evidence.

The pre-trial order contained the same provision for TMT. The parties did not identify any of the specific demonstrative evidence they intended to use at trial.

A general authorization to use demonstrative evidence at trial is not what the law requires to tax the costs of that evidence. That the parties were given general authorization does not amount to a pre-trial finding that the substantial sum of $58,861.95 spent by Zapata was necessary.

The cases where courts have allowed costs for demonstrative evidence all involved a request or authorization

by the court for a specific item of evidence. In *J.T. Gibbons*, 760 F.2d at 616, the court approved taxation of the costs of operating audiovisual equipment because the district court's specific pre-trial request for the equipment amounted to pre-trial authorization. Similarly, in *Walker*, 115 F.R.D. at 474, the court taxed $85.86 for the cost of a photograph to be introduced at trial where the photograph was listed in the pre-trial order as an exhibit to be offered at trial.

In this case, the court did not give pre-trial authorization for Zapata's demonstrative evidence. None of the charts, graphs or photographs for which Zapata seeks reimbursement were identified in the pre-trial order. In fact, they are not identified in Zapata's motion either. The court did not request any of the demonstrative evidence. Therefore, it may not be taxed to TMT. As the court did request the parties to prepare bench books, the court will tax the cost of the binders, $504.88.

II. MOTION FOR PREJUDGMENT INTEREST

Zapata asks the court to impose prejudgment interest on the actual damages awarded by the jury. Under 15 U.S.C. § 15, a court may award prejudgment interest where it is "just in the circumstances".

> In determining whether an award of interest under this section for any period is just under the circumstances, the court shall consider only—
>
> (1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative *acted intentionally for delay, or otherwise acted in bad faith*;
>
> (2) whether, in the course of the action involved, such person or the representative, *violated any applicable rule, statute, or court order providing for sanc-*

tions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, *engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.* (Emphasis added.)

There are a number of instances in this case where both defendants, TMT and Sea-Land, caused delays.[3] On some occasions the delays were unavoidable. For instance, the defendants sought an interlocutory appeal and stay pending resolution of whether the filed rate doctrine barred the suit. In doing so, the defendants' conduct was not in bad faith or primarily for the purpose of delay. The court certified an appeal of the denial of the defendants' motion to dismiss because the motion involved a controlling question of law on which there is a substantial difference of opinion. On other occasions, the court granted the defendants' requests for continuance because it was in the interest of justice. The complexities of the case required additional time for full discovery and addressing dispositive motions.

There are three instances where the defendants raised frivolous matters that arguably could be the basis for imposing prejudgment interest. In October, 1987, TMT and Sea-Land expressed concern about a possible Rule 11 violation in the filing of this suit. The court allowed a brief period of discovery on that issue. After conducting an *in camera* review of plaintiff's counsel's files, the court ruled that the defendants' concern was baseless. *See* Minute Entry entered March 10, 1988, Rec. Doc. # 123. As a result, the defendants never brought a formal Rule 11 charge and the matter delayed the proceedings for only a few weeks.

---

[3] Sea-Land is not before the court because it entered a settlement agreement with Zapata a few days prior to trial. TMT and Sea-Land usually took the same position on pre-trial matters.

The defendants subsequently sought leave to file third-party complaints and counterclaims alleging "sham litigation", that is, that the plaintiff was not motivated by a genuine desire for judicial relief, but instead sought to chill competition through litigation. While this issue is different from a Rule 11 claim, it was based on the same evidence the court found insufficient to support a Rule 11 claim. That the defendants persisted in alleging improprieties, despite the court having found no such evidence in plaintiff's counsel's files, was arguably basis for a Rule 11 claim against defense counsel. To accommodate the interests of allowing liberal amendments to the pleadings and avoiding any further delay in resolving the merits of the main demand, the court granted leave to file the amendments, but severed them from the main demand. Therefore, the amended claims alleging sham litigation did not affect the trial date. Whether the third-party claims and counterclaims were in violation of Rule 11 or some other rule was never addressed because TMT dismissed its claims after the jury rendered its verdict on the main demand.

The third frivolous matter raised by the defendants was their joint motion for recusal. It is not necessary to repeat here the court's lengthy findings in support of its ruling that the motion lacked any merit, contained numerous misrepresentations, and was filed for the purpose of delay. *See* Transcript of oral reasons rendered July 19, 1989, Rec. Doc. 397. The court denied the motion to recuse and the Fifth Circuit denied the defendants' petition for writ of mandamus. Thus, the motion for recusal caused little delay in the proceedings.

Although the court views these matters as frivolous, there is no evidence establishing that TMT acted in bad faith. Even assuming that TMT acted primarily for the purpose of delay, no significant delay resulted because the court insisted on moving the case. TMT was never found to have violated any rules sanctioning dilatory behavior.

In these circumstances, it would not be just to impose prejudgment interest.[4]

Accordingly,

IT IS ORDERED that:

1) Zapata Gulf Marine Corporation's Motion to Tax Costs is GRANTED IN PART. The Clerk shall amend the judgment to include costs in favor of plaintiff, Zapata Gulf Marine Corporation, and against defendant, Trailer Marine Transport Corporation, in the amount of $84,776.52.

2) Zapata Gulf Marine Corporation's Motion for Prejudgment Interest is DENIED.

New Orleans, Louisiana this 12th day of October, 1990.

/s/ Henry A. Mentz, Jr.
United States District Judge

[4] Neither the court nor the parties found any case where the court imposed prejudgment interest under 15 U.S.C. § 15(a).

APPENDIX K

IN THE UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Appeal No. 90-3696

ZAPATA GULF MARINE CORPORATION,
Plaintiff-Appellee

v.

TRAILER MARINE TRANSPORT CORPORATION,
Defendant-Appellant

On Appeal From the United States District Court
for the Eastern District of Louisiana
Civil Action No. 86-2911, Hon. Henry A. Mentz, Jr.
United States District Judge

AFFIDAVIT

BEFORE ME, the undersigned notary public, came and appeared DANDO B. CELLINI, who first being duly sworn, did state as follows:

1. I am an attorney in the law firm of McGlinchey, Stafford, Cellini & Lang, and I represent Trailer Marine Transport Corporation ("TMT"), the defendant-appellant in this case. I am personally familiar with all the facts pertaining to the proceedings in the district court, and with the appeal proceedings.

2. On or about October 16, 1990, I received from the district court a document entitled "Order and Reasons,"

entered on October 15, 1990, wherein the court had ordered, in pertinent part, that: "The Clerk shall amend the judgment to include costs in favor of plaintiff. . . ."

3. The foregoing order was a cause of concern because plaintiff-appellee Zapata Gulf Marine Corporation ("Zapata") had been granted a motion for certification of a final judgment pursuant to Federal Rule of Civil Procedure 54(b). It was my understanding that this judgment could not be so amended, and that if it were somehow revised there could be an adverse effect upon TMT's notice of appeal, which had been filed on September 21, 1990.

4. I decided that I should contact the district court to bring to its attention its order directing the amendment of the Rule 54(b) final judgment, from which an appeal had already been taken, and to express my belief that it could not be amended. Accordingly, on or about October 16, 1990, I telephoned Judge Mentz, but was informed that he was out of chambers for several days. I expressed my concerns to Judge Mentz's law clerk, Ms. Jamie Pinney, who advised me that the court would not attempt to amend the Rule 54(b) judgment, and that I should discuss this matter with opposing counsel in order to work out a suitable procedure for dealing with the issue.

5. Subsequent to my conversation with Ms. Pinney, I had telephone conversations with counsel for Zapata, Mr. Joseph N. Mole, recounting my discussion with Ms. Pinney and explaining my concerns. Mr. Mole expressed no objection to a retraction of the court's order to amend the judgment. We thereafter entered into a stipulation which, *inter alia*, stated that the district court would issue an order deleting the October 15th direction to the Clerk to "amend the judgment," and that the court would enter a separate judgment with respect to the denial of prejudgment interest. The district court signed and en-

tered the order to approve the stipulation and the judgment denying prejudgment interest on November 9, 1990.

6. Exhibits 8, 9 and 10 are true and correct copies of correspondence between counsel in this case.

/s/ Dando B. Cellini
DANDO B. CELLINI

Sworn to and subscribed before me this 18th day of January, 1991.

/s/ Joseph I. Giarrusso, Jr.
Notary Public

Law Offices
LEMLE & KELLEHER
A Partnership Including Professional Corporations
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New Orleans, Louisiana 70130-6097
Telephone: (504) 586-1241

Writer's Direct Dial Number
584-9416

November 2, 1990

Dando B. Cellini, Esq.
McGlinchey, Stafford, Cellini & Lang
643 Magazine Street
New Orleans, Louisiana 70130

Re: Zapata v. PRMSA, et al.

Dear Dando:

Enclosed is my attempt to memorialize and put into effect our agreement on attorneys' fees and costs. I used an Amended Judgment because my own research indicated that is the usual practice; however, I have no objection to any other method you feel will accomplish the same result and which will be acceptable to the Court.

Upon informing Jamie Pinney of the fact of our settlement on this issue, she indicated that the Court wants to enter any Judgment and/or Order no later than next Wednesday, and that we need to get our final product to the Court by Tuesday.

Very truly yours,

/s/ Joseph N. Mole
JOSEPH N. MOLE

JNM:kcb
Enclosures

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-2911

SECTION I

MAGISTRATE DIVISION 6

ZAPATA GULF MARINE CORP., ASSIGNEE OF ROBERT E. BRIZENDINE, TRUSTEE OF THE CHAPTER 7 ESTATE OF AMERICAN CARIBE LINES, INC.

versus

PUERTO RICO MARITIME SHIPPING AUTHORITY, SEA-LAND SERVICE, INC. & TRAILER MARINE TRANSPORT CORP.

STIPULATION

Defendant, Trailer Marine Transport Corporation, ("TMT") and Plaintiff, Zapata Gulf Marine Corporation ("ZGMC"), acting through their respective undersigned counsel, hereby stipulate as follows:

1. The appropriate amount of attorneys' fees due plaintiff for all work performed in this case up to and including March 4, 1990 is $1.7 million.

2. The appropriate amount due plaintiff for all legally compensable costs incurred in this case up to and including March 4, 1990 is that amount awarded in the Court's Order and Reasons entered in this case on October 15, 1990, or $84,776.52.

3. Execution of any order or judgment awarding such attorneys' fees and costs will be stayed until the TMT Judgment is final within the

meaning of Paragraph 5 of the Court's Order Staying Execution of Judgment and Providing for Alternate Security, entered in this case on April 17, 1990.

4. Neither TMT nor ZGMC will appeal that portion of any judgment or order awarding the fees or costs set forth above.

5. This stipulation shall have no effect on Plaintiff's right to seek additional fees or costs incurred following the dates set forth in stipulations 1 and 2 above.

Dated: New Orleans, Louisiana, this — day of November, 1990.

McGLINCHEY, STAFFORD, CELLINI & LAND, PC

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-2911

SECTION I

MAGISTRATE DIVISION 6

ZAPATA GULF MARINE CORP., ASSIGNEE OF ROBERT E. BRIZENDINE, TRUSTEE OF THE CHAPTER 7 ESTATE OF AMERICAN CARIBE LINES, INC.

versus

PUERTO RICO MARITIME SHIPPING AUTHORITY, SEA-LAND SERVICE, INC. & TRAILER MARINE TRANSPORT CORP.

JOINT MOTION AND ORDER FOR ENTRY OF AMENDED JUDGMENT AND APPROVAL OF STIPULATION

NOW INTO COURT, through undersigned counsel, come Defendant, Trailer Marine Transport Corporation ("TMT") and Plaintiff, Zapata Gulf Marine Corporation ("ZGMC"), who, pursuant to the Court's instructions, have conferred in order to reach agreement upon the appropriate amount of attorneys' fees and costs to be awarded plaintiff for the successful prosecution of this case, and, upon representation to the Court that they have so conferred and agreed, move the Court for an Order approving the Stipulation representing the parties' agreement to the appropriate amount of said costs and

fees, and for the entry of an Amended Judgment in accordance therewith.

McGLINCHEY, STAFFORD, CELLINI & LANG, PC

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New Orleans, Louisiana, 70130
Telephone: (504) 586-1241
Attorneys for Plaintiff,
Zapata Gulf Marine
Corporation

ORDER

Upon consideration of the foregoing motion for entry of amended judgment and approval of stipulation, the motion for entry of an amended judgment is GRANTED, as evidenced by the execution by the court of the amended judgment submitted herewith, and

IT IS ORDERED, that the stipulation entered into by counsel for Trailer Marine Transport Corporation and Zapata Gulf Marine Corporation dated November —, 1990, is hereby approved, and the clerk of this Court is ordered to accept said stipulation for filing and enter it upon the docket of this matter.

New Orleans, Louisiana, this — day of November, 1990.

_____

United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-2911

SECTION I

MAGISTRATE DIVISION 6

ZAPATA GULF MARINE CORP., ASSIGNEE OF ROBERT E. BRIZENDINE, TRUSTEE OF THE CHAPTER 7 ESTATE OF AMERICAN CARIBE LINES, INC.

versus

PUERTO RICO MARITIME SHIPPING AUTHORITY, SEA-LAND SERVICE, INC. & TRAILER MARINE TRANSPORT CORP.

AMENDED JUDGMENT

This matter having been tried to a jury; judgment having been entered herein on March 22, 1990 pursuant to Rule 54(b) of the Federal Rules of Civil Procedure; the Plaintiff having moved for an award of prejudgment interest; the Court having denied Defendant's motion for new trial and judgment notwithstanding the verdict; and the parties having stipulated with respect to the appropriate amount of costs and attorneys' fees to be awarded to Plaintiff,

IT IS ORDERED AND ADJUDGED: (1) that in addition to the award of $41 million contained in the Court's judgment entered on March 22, 1990, Plaintiff recover of Defendant costs in the amount of $84,766.52, and attorneys' fees in the amount of $1.7 million; (2) that Plaintiff's motion for pre-judgment interest is DE-

NIED; and (3) that Plaintiff be awarded interest on the sum of $41 million at the judicial rate described in 28 U.S.C. § 1961 from March 22, 1990 until paid, and on the attorneys' fees and costs described herein from the date of the entry of this judgment until paid.

New Orleans, Louisiana, this — day of November, 1990.

United States District Judge

McGLINCHEY, STAFFORD, CELLINI & LANG
643 Magazine Street
New Orleans, LA 70130-3477
Mailing Address: P.O. Box 60643
New Orleans, LA 70160-0643

(504) 586-1200

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November 5, 1990

BY FAX: 584-9142

Mr. Joseph N. Mole
Lemle & Kelleher
21st Floor, Pan-American Life Center
601 Poydras Street
New Orleans, LA 70130

Re: Zapata Gulf Marine Corporation v. Puerto Rico Maritime Shipping Authority, *et al.*, Civil Action No. 86-2911, U.S.D.C. Eastern District of Louisiana. Our Ref. 8241-01-6.

Dear Joe:

This will respond to your letter of November 2, 1990 and enclosed draft Stipulation and Joint Motion and Order for Entry of Amended Judgment and Approval of Stipulation.

Dando and I have talked and certainly agree that a stipulation should be approved and entered by Judge Mentz. In place of the current paragraph 3 of your draft stipulation, however, we suggest the following language:

3. TMT agrees to pay the amounts stipulated in paragraphs 1 and 2 if and when the TMT judgment, as defined in paragraph 2 of the Court's Order Staying Execution of Judgment and Providing for Alternate Security entered on April 17, 1990, shall be affirmed and become final as

defined in paragraph 5 of the Court's April 17, 1990 Order.

4. TMT and ZGMC have agreed to forego any rights to appeal any order awarding the fees or costs set forth above.

If we can agree on a stipulation, which can then be approved and entered by the court, there will be no need for any judgment, amended or otherwise on this issue. We are concerned that the entry of your proposed Amended Judgment will jeopardize the pending appeal, and our research supports that concern. The only practical purpose an Amended Judgment would serve would be if one or more of the parties wanted to appeal the issue of attorneys fees or costs, which is not the case here.

Accordingly, we would suggest that a mutually agreeable stipulation simply be approved and entered by the court.

Obviously, we are happy to discuss any of this with you at any time.

Sincerely,

/s/ Victoria K. McHenry
VICTORIA K. MCHENRY

VKM/nz

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November 6, 1990

Victoria K. McHenry, Esq.
McGlinchey, Stafford, Cellini
& Lang
643 Magazine Street
New Orleans, Louisiana 70130

Re: Zapata Gulf Marine Corporation v. Puerto Rico Maritime Shipping Authority, et al.
U.S.D.C. Civil Action No. 86-2911

Dear Vicky:

I do not care whether we have an amended judgment or not, so I have attempted to draft a new motion and order to accommodate your concerns. I need a judgment on prejudgment interest so the time to appeal that begins to run; accordingly, I have included that in the motion.

With respect to your changes to the stipulation, my research indicates interest runs on attorneys' fees and costs from the date they become a liquidated obligation. Since interest on fees and costs was addressed in the amended judgment which we have deleted, you need to address it in the stipulation.

I look forward to your reply.

Very truly yours,

/s/ Joseph N. Mole
JOSEPH N. MOLE

JNM:kcb

Enclosures

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-2911

SECTION I

MAGISTRATE DIVISION 6

ZAPATA GULF MARINE CORP., ASSIGNEE OF ROBERT E. BRIZENDINE, TRUSTEE OF THE CHAPTER 7 ESTATE OF AMERICAN CARIBE LINES, INC.

versus

PUERTO RICO MARITIME SHIPPING AUTHORITY, SEA-LAND SERVICE, INC. & TRAILER MARINE TRANSPORT CORP.

MOTION AND ORDER FOR APPROVAL OF STIPULATION AND ENTRY OF ORDER WITH RESPECT TO PREJUDGMENT INTEREST

NOW INTO COURT, through undersigned counsel, come Defendant, Trailer Marine Transport Corporation and Plaintiff, Zapata Gulf Marine Corporation, who, pursuant to the Court's directives, have conferred and agreed on the appropriate amounts of costs and attorneys' fees to be awarded to plaintiff in this matter, and move the Court for an order (1) approving the stipulation submitted herewith, dated November 5, 1990, (2) amending its order of October 15, 1990, so as to direct the clerk not to enter any judgment or order with respect to attorneys'

fees or costs, and (3) directing the clerk to enter a judgment denying plaintiff's motion for prejudgment interest.

McGLINCHEY, STAFFORD, CELLINI & LANG, PC

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Attorneys for Plaintiff, Zapata Gulf Marine Corporation

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-2911

SECTION I

MAGISTRATE DIVISION 6

ZAPATA GULF MARINE CORP., ASSIGNEE OF ROBERT E. BRIZENDINE, TRUSTEE OF THE CHAPTER 7 ESTATE OF AMERICAN CARIBE LINES, INC.

versus

PUERTO RICO MARITIME SHIPPING AUTHORITY, SEA-LAND SERVICE, INC. & TRAILER MARINE TRANSPORT CORP.

ORDER

Upon consideration of the foregoing Motion and Order for Approval of Stipulation and Entry of Order with respect to Prejudgment Interest,

IT IS HEREBY ORDERED that the stipulation entered into on November 5, 1990 by the parties to this lawsuit with respect to attorneys' fees and costs is hereby approved and the clerk is ordered to accept said stipulation for filing and enter it on the docket of this case;

IT IS FURTHER ORDERED that the Court's Order and Reasons of October 15, 1990 are hereby amended so as to delete any order that judgment be entered in this matter with respect to costs or attorneys' fees; and

IT IS FURTHER ORDERED that the clerk enter forthwith the Court's Judgment denying the Plaintiff's motion for prejudgment interest.

New Orleans, Louisiana, November —, 1990.

United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-2911

SECTION I

MAGISTRATE DIVISION 6

ZAPATA GULF MARINE CORP., ASSIGNEE OF ROBERT E. BRIZENDINE, TRUSTEE OF THE CHAPTER 7 ESTATE OF AMERICAN CARIBE LINES, INC.

versus

PUERTO RICO MARITIME SHIPPING AUTHORITY, SEA-LAND SERVICE, INC. & TRAILER MARINE TRANSPORT CORP.

JUDGMENT

Upon consideration of the Plaintiff's motion for prejudgment interest, and for the reasons recited in the Court's Order and Reasons, entered herein on October 15, 1990,

IT IS ORDERED AND ADJUDGED that the Motion of Plaintiff, Zapata Gulf Marine Corporation, for prejudgment interest is DENIED.

New Orleans, Louisiana, November —, 1990.

United States District Judge

APPENDIX L

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-2911

SECTION I

MAGISTRATE DIVISION 6

ZAPATA GULF MARINE CORPORATION, ASSIGNEE OF ROBERT E. BRIZENDINE, TRUSTEE OF THE CHAPTER 7 ESTATE OF AMERICAN CARIBE LINES, INC.

versus

PUERTO RICO MARITIME SHIPPING AUTHORITY, SEA-LAND SERVICE, INC. and TRAILER MARINE TRANSPORT CORPORATION

MOTION AND ORDER FOR APPROVAL OF STIPULATION AND ENTRY OF ORDER WITH RESPECT TO PREJUDGMENT INTEREST

[Entered Nov. 9, 1990]

NOW INTO COURT, through undersigned counsel, come Defendant, Trailer Marine Transport Corporation and Plaintiff, Zapata Gulf Marine Corporation, who, pursuant to the Court's directives, have conferred and agreed on the appropriate amounts of costs and attorneys' fees to be awarded to plaintiff in this matter, and move the Court for an order (1) approving the stipulation submitted herewith, dated November 5, 1990, (2) amending its order of October 15, 1990, so as to direct the clerk not to enter any judgment or order with respect to attor-

neys' fees or costs, and (3) directing the clerk to enter a judgment denying plaintiff's motion for prejudgment interest.

McGLINCHEY, STAFFORD, CELLINI & LANG, PC

/s/ D. B. Cellini
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Trailer Marine Transport Corporation

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/s/ J. N. Mole
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-2911

SECTION I

MAGISTRATE DIVISION 6

ZAPATA GULF MARINE CORPORATION, ASSIGNEE OF ROBERT E. BRIZENDINE, TRUSTEE OF THE CHAPTER 7 ESTATE OF AMERICAN CARIBE LINES, INC.

versus

PUERTO RICO MARITIME SHIPPING AUTHORITY, SEA-LAND SERVICE, INC. and TRAILER MARINE TRANSPORT CORPORATION

ORDER

Upon consideration of the foregoing Motion and Order for Approval of Stipulation and Entry of Order with respect to Prejudgment Interest,

IT IS HEREBY ORDERED that the stipulation entered into on November 5, 1990 by the parties to this lawsuit with respect to attorneys' fees and costs is hereby approved and the clerk is ordered to accept said stipulation for filing and enter it on the docket of this case;

IT IS FURTHER ORDERED that the Court's Order and Reasons of October 15, 1990 are hereby amended so as to delete any order that judgment be entered in this matter with respect to costs or attorneys' fees; and

IT IS FURTHER ORDERED that the clerk enter forthwith the Court's Judgment denying the Plaintiff's motion for prejudgment interest.

New Orleans, Louisiana, November 7th, 1990.

/s/ Henry A. Mentz, Jr.
United States District Judge

APPENDIX M

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-2911

SECTION I

MAGISTRATE DIVISION 6

ZAPATA GULF MARINE CORPORATION, ASSIGNEE OF ROBERT E. BRIZENDINE, TRUSTEE OF THE CHAPTER 7 ESTATE OF AMERICAN CARIBE LINES, INC.

versus

PUERTO RICO MARITIME SHIPPING AUTHORITY, SEA-LAND SERVICE, INC. and TRAILER MARINE TRANSPORT CORPORATION

JUDGMENT

[Entered Nov. 9, 1990]

Upon consideration of the Plaintiff's motion for pre-judgment interest, and for the reasons recited in the Court's Order and Reasons, entered herein on October 15, 1990,

IT IS ORDERED AND ADJUDGED that the Motion of Plaintiff, Zapata Gulf Marine Corporation, for pre-judgment interest is DENIED.

New Orleans, Louisiana, November 7th, 1990.

/s/ Henry A. Mentz, Jr.
United States District Judge

APPENDIX N

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-3696

ZAPATA GULF MARINE CORPORATION, ETC.,
Plaintiff-Appellee,
v.
PUERTO RICO MARITIME SHIPPING AUTHORITY, *et al.*,
Defendants,
TRAILER MARINE TRANSPORT CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana

[Entered Apr. 25, 1991]

ORDER:

☒ The motion of Trailer Marine Transport Corporation for ☒ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including May 15, 1991, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ Sam Johnson
SAM D. JOHNSON
United States Circuit Judge

Supreme Court, U.S.
FILED
JUN 5 1991
OFFICE OF THE CLERK

No. 90-1749

In The

Supreme Court of the United States

October Term, 1990

TRAILER MARINE TRANSPORT CORPORATION,

Petitioner,

v.

ZAPATA GULF MARINE CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOSEPH N. MOLE*
EDWARD F. KOHNKE, IV
GEORGE FRAZIER
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Attorneys for Respondent
Zapata Gulf Marine Corporation

*Counsel of Record

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Is a motion for discretionary prejudgment interest under Section 4 of the Clayton Act a motion for prejudgment interest within the meaning given that term by the Court in *Osterneck v. Ernst & Whinney*, 489 U.S. 109 (1989)?

2. Does a motion for discretionary prejudgment interest filed within 10 days after the entry of judgment constitute a Rule 59 motion to alter or amend the judgment so as to render ineffective any notice of appeal filed before a ruling on that motion?

LIST OF PARTIES, PARENTS AND SUBSIDIARIES

The parties to the proceedings below were Petitioner Trailer Marine Transport Corporation and Respondent Zapata Gulf Marine Corporation.

The shares of Zapata Gulf Marine Corporation are owned by the following entities: B C Partners L.P.; Zapata Corporation; Corporate Partners, L.P.; Corporate Offshore Partners, L.P.; and the State Board of Administrators of Florida. Zapata Gulf Marine Corporation owns a 70% interest in Marine Transportation Services Sea-Barge Group, Inc.

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No. 90-1749

In The

Supreme Court of the United States

October Term, 1990

TRAILER MARINE TRANSPORT CORPORATION,

Petitioner,

v.

ZAPATA GULF MARINE CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Petition presents no ground specified in Rule 10 of this Court. The question of law involved in this case has been definitively decided by the Court, the ruling sought to be reviewed is consistent with that decision, and the purported conflict among the Circuits is illusory. Accordingly, Respondent Zapata Gulf Marine Corporation respectfully requests that the Court deny the Petition for Writ of Certiorari to Review the Decision of the United States Court of Appeals for the Fifth Circuit.

OPINIONS AND ORDERS BELOW

Jurisdictionally relevant Opinions and Orders are found in the Appendices to the Petition for Writ of Certiorari. The Opinion of the United States Court of Appeals for the Fifth Circuit dismissing Petitioner's appeal is reported at 925 F.2d 812 and reproduced in Appendix A to the Petition. The unreported Order of the court of appeals denying the Petition for Rehearing and the Suggestion for Rehearing *En Banc* was entered April 2, 1991 and is reproduced in Appendix B to the Petition.

JURISDICTION

1. The Fifth Circuit's decision that it had no jurisdiction to review Petitioner's appeal was issued on February 25, 1991. A Petition for Rehearing was filed within the allotted time and denied April 2, 1991. The Petition for Writ of Certiorari was filed May 15, 1991.

2. The district court had jurisdiction under 28 U.S.C. § 1337 and 15 U.S.C. § 15(a).

STATUTES AND RULES INVOLVED

The statutes and rules relevant to this case are as follows:

1. Federal Rule of Appellate Procedure 4(a)(4):

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional

findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

2. Federal Rule of Civil Procedure 59(e):

A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

3. Clayton Act § 4(a), 15 U.S.C. § 15(a):

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In

determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only –

> (1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;
>
> (2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and
>
> (3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

COUNTERSTATEMENT OF THE CASE

By decision dated February 25, 1991, the Fifth Circuit dismissed the appeal of Petitioner Trailer Marine Transportation Corporation ("TMT"). The Fifth Circuit held that it lacked jurisdiction because TMT failed to file any notice of appeal following the district court's order denying the motion of Respondent Zapata Gulf Marine Corporation ("Zapata") for an award of prejudgment interest under Section 4 of the Clayton Act. In so doing, the Fifth Circuit followed the unambiguous holding of this Court in *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989).

TMT has sought to avoid the rule of *Osterneck* by stating that what Zapata filed was a motion for sanctions. That is not so.[1] Zapata's motion was a motion for prejudgment interest. Section 4 of the Clayton Act is entitled: "Suits by persons injured: (a) Amount of recovery; prejudgment interest." 15 U.S.C. § 15(a). Zapata's motion did not even arguably seek sanctions. TMT's Petition is an attempt to create an artificial conflict between the Fifth Circuit's decision in this case and decisions of other circuit courts dealing with the effect of motions for sanctions. The attempt cannot work because this is a case about the effects of a post-judgment motion for prejudgment interest, a subject which is foreclosed by the rule of *Osterneck*. Thus, TMT's statement of the case is a materially accurate recitation of the sequence of events which occurred below, with the following exceptions: (1) Zapata did not file a motion for sanctions; (2) the Fifth Circuit did not address the effect of a motion for sanctions; and (3) Section 4 of the Clayton Act does not provide for an award of sanctions. Once that is seen, the rest of the Petition is an interesting, but irrelevant, discussion of an issue not before the Court.

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[1] Respondent could have filed, but did not file, a separate motion for sanctions. It filed three separate motions on March 27, 1990: a motion for prejudgment interest, a motion for costs, and a motion for attorney's fees.

REASONS WHY THE PETITION SHOULD BE DENIED

In its 1989 term, this Court framed the only question relevant to this case as follows:

> [W]hether a motion for discretionary prejudgment interest filed after the entry of judgment constitutes a Rule 59 motion to alter or amend the judgment and renders ineffective any notice of appeal filed before a ruling on that motion.

The unanimous answer of the Court was affirmative. *Osterneck v. Ernst & Whinney*, 489 U.S. at 170. In the interests of " 'operational consistency and predictability in the overall application of the [finality requirement] of §1291' ", the Court established a "bright-line rule" that timely-filed motions for prejudgment interest are motions to alter or amend the judgment under Rule 59 of the Federal Rules of Civil Procedure, so that Rule 4 of the Federal Rules of Appellate Procedure requires that a new notice of appeal be filed after their disposition regardless of the type of prejudgment interest in question. 489 U.S. at 177 n.3. That is the rule that governs this case. TMT's repeated assertion that this is a case about sanctions does not make it so.

I. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL CONCERNING THE ISSUE PRESENTED BY THE PETITION.

TMT has urged this Court to grant the Petition based on a purported conflict between the circuit courts over the proper treatment of a motion for Rule 11 sanctions. That issue is not before the Court. Petitioner's contention that clarification by the Court is necessary to dispel lower courts' confusion about "litigation sanctions" and Federal

Rule of Civil Procedure 59(e) is unsupported by the cases. Whatever uncertainty there may have been was eliminated by recent decisions of the Court, primarily *Osterneck* and *Budinich v. Becton Dickson & Co.*, 486 U.S. 196 (1988).

In *Osterneck*, the Court cited its opinion in *Budinich* for the principle that the Court was establishing a "practical approach" that did not depend on the characterization of the particular motion in question as involving collateral or non-collateral prejudgment interest. *See* 486 U.S. at 202. When *Budinich* and *Osterneck* are read together, the Rule is clear: Motions for attorney's fees are not motions under Rule 59 and motions for prejudgment interest are Rule 59 motions, regardless of their characterization as "merits" or "nonmerits". The reasoning is this:

> [A]s we said last Term in *Budinich*, "what is of importance here is not preservation of conceptual consistency in the status of a particular [type of motion] as 'merits' or 'non-merits,' but rather preservation of operational consistency and predictability in the overall application of the [finality requirement] of § 1291." "Courts and litigants are best served by the bright-line rule, which accords with traditional understanding," that a motion for prejudgment interest implicates the merits of the District Court's judgment.

489 U.S. at 177 n.3 (citation omitted).

To read *Osterneck* as Petitioner suggests would destroy the certainty created by *Osterneck* and *Budinich*. The standard proposed by Petitioner would require courts to examine the legislative history, the purpose, and the jurisprudential rationale behind the prejudgment

interest in question, each time the issue arose. Such a result would mean that the Court wasted its time in considering and writing *Osterneck*.[2]

Osterneck has achieved the Court's policy of certainty. It has been cited often and followed consistently by the courts of appeals confronted with the issue in this case. *E.g., Dunn v. Truck World, Inc.*, 929 F.2d at 311, 312-13 (7th Cir. 1991); *Lawson v. Gelman Sciences, Inc.*, No. 90-3376 (6th Cir. Feb. 1, 1991); *Keith v. Truck Stops Corp. of America*, 909 F.2d 743, 746 (3d Cir. 1990) (dealing with prejudgment

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[2] There are dozens of state and federal statutes that provide for prejudgment interest for a variety of reasons, including compensation, encouraging settlements, relieving court congestion, and delay damages assessed against unsuccessful defendants. There are also uncodified common law and equitable bases for awards of prejudgment interest. There are at least an equal number of cases interpreting these statutory and uncodified common law and equitable bases for awards of prejudgment interest. *See* Comment, *Prejudgment Interest: Survey and Suggestion*, 77 Northwestern L. Rev. 192 (1982). *See also* the following annotations that discuss prejudgment interest: Annot., *Admiralty – Prejudgment Interest*, 34 A.L.R. Fed. 126 (1977); Annot., *Allowance of Prejudgment Interest on Builder's Recovery in Action for Breach of Construction Contract*, 60 A.L.R. 3d 487 (1974); Annot., *Recovery of Prejudgment Interest on Wrongful Death Damages*, 96 A.L.R. 2d 1104 (1964); Annot., *Application of 28 U.S.C. § 2516(a) to Government Contractor's Claim for Interest Expense for Loss of Use of its Capital Caused by Delay Attributable to Government*, 59 A.L.R. Fed. 905 (1982); Annot., *Automobile Insurer's Liability for Statutory Excess Interest for Delayed Payment of No-Fault Claim*, 14 A.L.R. 4th 761 (1982); Annot., *Insured's Right to Recover from Insurer Prejudgment Interest on Amount of Fire Loss*, 5 A.L.R. 4th 126 (1981); Annot., *Award of Prejudgment Interest Under Miller Act* (40 USCS §§ 270a et seq.), 66 A.L.R. Fed. 901 (1984).

interest mandatory under state law as compensation for delay, but suspendable if delay caused by plaintiff); *Rosen v. Rucker*, 905 F.2d 702, 705 (3d Cir. 1990); *Jurgens v. McKasy*, 905 F.2d 382, 385 (Fed. Cir. 1990) (prejudgment interest awarded in case brought under Lanham Act); *Adams-Arapahoe School District No. 28-J v. Continental Insurance Co.*, 891 F.2d 772, 780 (10th Cir. 1989). In *Rosen*, the Third Circuit held that a motion for litigation delay damages *was* analogous to prejudgment interest, and therefore subject to the *Osterneck* rule, on the following ground: "Treating a motion [for litigation delay damages] as a Rule 59(e) motion maintains relatively simple and comprehensible rules of procedure." 905 F.2d at 706. As explained by Judge Easterbrook, in discussing the cumulative effect of *Osterneck* and *Budinich*:

> The whole point of the [Budinich] case was to end case-by-case inquiries into the relation between the merits and the fee award. The Supreme Court chose a rule to enable both the parties and the court of appeals to know with certainty when the time for appeal begins and ends. . . .
>
> . . . .
>
> *Budinich*, in common with cases such as *Osterneck v. Ernst & Whinney*, emphasizes the need for simplicity and clarity in jurisdictional matters.

Dunn v. Truck World, Inc., 929 F.2d at 312-13 (7th Cir. 1991) (citation omitted).

The "state of confusion" expressed by TMT (Pet. at 10) is not shared by the courts. The only parties who are confused are those who are unaware of the simple bright-line rule of *Osterneck*. It is not the purpose of a writ of certiorari to correct mistakes of law.

Finally, the authority upon which Petitioner relies is inapposite. Petitioner cites a number a cases (Pet. at 10-11) illustrating that some courts of appeals consider motions for prejudgment interest to be motions to alter or amend the judgment within the meaning of Federal Rule of Civil Procedure 59(e), while others hold that motions for sanctions under Federal Rule of Civil Procedure 11 and 28 U.S.C. § 1927 are not Rule 59(e) motions. This is more than a mere *non sequitur*. Of the nine cases Petitioner cites as "[e]vidence of confusion about the relationship between sanctions motions and Rule 59(e)" (Pet. at 11), *eight* were decided before *Osterneck*, and thus show very little about lower courts' appreciation of that case and the need for a new pronouncement from this Court.[3] None purport to involve motions for prejudgment interest, and some seem irrelevant even to Petitioner's strained argument. *Kurkowski* and *Wojan*, for example, say no more than that a district court has jurisdiction to amend a judgment to impose sanctions sought by motion filed within 10 days of judgment of dismissal. 815 F.2d at 972, 819 F.2d at 203. This is unobjectionable, and Petitioner cannot seriously contend otherwise.

The ninth case, *Fisher v. Klein*, 873 F.2d 626 (2d Cir. 1989), is the only one referred to by Petitioner in which

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[3] *Lupo v. R. Rowland & Co.*, 857 F.2d 482 (8th Cir. 1988); *Beeman v. Fiester*, 852 F.2d 206 (7th Cir. 1988); *Wojan v. General Motors Corp.*, 851 F.2d 969 (7th Cir. 1988); *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90 (3d Cir. 1988); *Kurkowski v. Volcker*, 819 F.2d 201 (8th Cir. 1987); *Hicks v. Southern Maryland Health Systems Agency*, 805 F.2d 1165 (4th Cir. 1986); *Jackson Marine Corp. v. Harvey Barge Repair, Inc.*, 794 F.2d 989 (5th Cir. 1986); *Gordon v. Heimann*, 715 F.2d 531 (11th Cir. 1983).

Osterneck was actually relied upon by the court of appeals. In *Klein*, the Second Circuit did indeed find that a motion requesting that a judgment be amended under Federal Rule of Civil Procedure 59(e) to include an "award of sanctions" nullified a notice of appeal filed before the motion was resolved. 873 F.2d at 627. Assuming that the Court of Appeals used "sanctions" in its usual sense, the case may well have been incorrectly decided. But what has that to do with this case? A decision finding that a post-trial motion for sanctions of an unspecified nature was a Rule 59(e) motion hardly conflicts with a case holding a motion for prejudgment interest to be a Rule 59(e) motion. Indeed, there would be no conflict even if this case concerned a motion for sanctions, for then the only two post-*Osterneck* cases raised by Petitioner would be in agreement. But this is not a case about sanctions.

II. A MOTION FOR CLAYTON ACT PREJUDGMENT INTEREST IS A MOTION FOR PREJUDGMENT INTEREST AND NOT SANCTIONS FOR ATTORNEY MISCONDUCT.

Even assuming that an inquiry into the nature of Clayton Act prejudgment interest were relevant, it is not at all clear from the legislative history that such interest is intended as a penalty and it is certainly not a sanction for attorney misconduct in the same sense as sanctions under Rule 11 or 28 U.S.C. § 1927. It was, like almost all prejudgment interest, partly based on the rationale that an antitrust plaintiff "cannot really be made whole unless fully compensated by the payment of prejudgment

interest."[4] In response to questions concerning the proposed addition of prejudgment interest to Section 4 of the Clayton Act, John Shenefield, former Assistant Attorney General for the Antitrust Division, stated that it had two purposes:

> [t]o remove the incentive for delay [and] to provide the appropriate compensation and interest thereon to the plaintiff in pursuit of an award of damages.[5]

The legislative history shows that at the time it authorized prejudgment interest under the Clayton Act, Congress specifically considered – and rejected – a provision that would have imposed sanctions for *attorney* misconduct. Congress instead amended 28 U.S.C. § 1927 to impose such sanctions against attorneys guilty of dilatory tactics.[6] Thus, those who drafted the statutes intended an award of prejudgment interest under the Clayton Act to be an entirely separate matter from sanctions that can be imposed under, *e.g.*, 28 U.S.C. § 1927. Petitioner's repeated attempts to equate litigation sanctions and prejudgment interest (Pet. at 10, 19) are contradicted by the congressional history.

A further review of this legislative history reveals various motives behind the 1980 amendment and the fact

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[4] H.R. Rep. No. 875, 96th Cong., 2d Sess. (1980), *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 2766, 2767.

[5] H.R. Rep. 875, 96th Cong., 2d Sess. (1980), *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 2766, 2769.

[6] H.R. Conf. Rep. No. 1234, 96th Cong., 2d Sess. (1980), *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 2781, 2782.

that the final version of amended Section 4 was not the same as that which was originally proposed. That confusion supports the point made by this Court in *Budinich* and *Osterneck*: Litigants and courts should be able to tell from the plain words of statutes and jurisprudence when their judgments are final, and they should not be required to engage in an exegesis of the purpose and history of the prejudgment interest in question. Section 4 of the Clayton Act allows motions for "prejudgment interest" and not sanctions; *Osterneck* said all motions for prejudgment interest are motions under Rule 59(e); and Zapata filed a motion for prejudgment interest. The result reached by the Fifth Circuit in this case flows naturally from these facts.

The general purpose of Clayton Act prejudgment interest is the same as any discretionary prejudgment interest. "The purpose of allowing such [prejudgment] interest is to promote expeditious settlements of claims, and to discourage defendants from deferring payments of awards or settlements to injured plaintiffs." 47 C.J.S. *Interest and Usury* § 49 (1982). Interest for money in general, and on judgments in specific, is always measured by the amount owed. "Interest is the compensation allowed by law . . . for the . . . detention of money." BLACK'S LAW DICTIONARY 729 (5th ed. 1979). In that sense, prejudgment interest is always directly related to the merits and not collateral. In the sense that it is always a mere mechanical function of a rate and a principal amount, it is seldom, if ever, directly related to the facts of the case. It is just this sort of inquiry which *Osterneck* and *Budinich* sought to avoid and rendered irrelevant.

In support of its contention that this case is primarily about Rule 11 sanctions for attorney misconduct, Petitioner makes several other arguments concerning the purported similarity between sanctions available for attorney misconduct under Rule 11 and 28 U.S.C. § 1927 on the one hand and prejudgment interest under 15 U.S.C. § 15 on the other. Again, the whole purpose of *Osterneck* was to obviate the need to examine such merits or nonmerits issues. Nevertheless, even these arguments are hollow. Specifically:

- TMT points out that prejudgment interest is one of the possible sanctions available under Rule 11. Rule 11 and Rule 37 also allow a court to default an intransigent defendant. That is certainly not "collateral" to the merits.

- TMT argues that "§ 4(a) of the Clayton Act actually incorporates the standards of Rule 11" and "closely tracks the standards set forth in Rule 11" (Pet. at 19). That is impossible. Rule 11 was amended to its present form in 1983; Section 4 of the Clayton Act was amended to its present form in 1980. All Section 4(a)(2) of the amended Clayton Act does is allow a trial court to consider sanctionable attorney misconduct as one factor in its decision whether to award prejudgment interest as part of a plaintiff's compensation for the delay in achieving its award.

- TMT argues that Clayton Act prejudgment interest is unrelated to the "merits" of the underlying litigation. An examination of Zapata's motion for prejudgment interest (Pet. App. F) and the district court's opinion (Pet. App. J) reveals that the almost exclusive concern of both was the relationship of Petitioner's motion practice to the merits of the

case. Under 15 U.S.C. § 15(a), the district court had to consider the extent to which TMT's motions were "lacking in merit" to reach its conclusion that several of TMT's tactics were frivolous, but not in bad faith (Pet. App. J, at 63a).

- TMT argues that Clayton Act prejudgment interest is purely penal. An award of prejudgment interest would have added approximately $4 million to Zapata's award for TMT's destruction of a business in 1984. That certainly would have helped to make Zapata "whole" for the profits and investments it had lost six years previously. To Respondent, then, an award of prejudgment interest would have been compensatory and not penal.

TMT's argument that prejudgment interest is "collateral" to the main award and therefore a sanction is sophistry. Section 4 of the Clayton Act creates the private cause of action for antitrust victims, authorizes trebled damages and allows for a discretionary award of prejudgment interest. Prejudgment interest is only available after judgment for a plaintiff is entered, and, unlike attorney's fees and costs, it is a direct function of the amount of the untrebled judgment. It can only be assessed against the defendant and not against an attorney. Rule 11, Rule 37, and § 1927 sanctions are primarily, if not entirely, directed at counsel misconduct; they can be assessed at any point in the litigation process; they are customarily assessed in amounts related only to the immediate harm done by counsel misconduct; and they can be awarded regardless of the outcome of the litigation. Again, however, in the face of *Osterneck's* clear rule, all of these arguments are

academic. A motion for prejudgment interest, discretionary or mandatory, and regardless of its relationship to the "merits", is a motion to alter or amend a judgment under Rule 59(e), which stays finality under Rule 4(a)(4) until disposed of.

III. THIS IS NOT AN APPROPRIATE CASE FOR REVIEW

Finally, Petitioner argues that this case would be ideal for the court's consideration of the proper treatment of motions for sanctions under the Clayton Act and "all other sources of sanctions for litigation misbehavior" because subsection (2) of 15 U.S.C. § 15(a) allows the trial court to consider whether a party or its representative violated *any* "applicable rule, statute, or court order providing for sanctions. . . . " (Pet. at 9). This, Petitioner argues, means that 15 U.S.C. § 15(a)(2) *"subsumes all sources of authority* for litigation sanctions. . . . " (Pet. at 12) [emphasis added]. That is not a logical deduction. Furthermore, an examination of Respondent's motion for prejudgment interest (Pet. App. F, at 39a *et seq.*) reveals that it sought relief *only* under subsections (1) and (3) of 15 U.S.C. § 15(a), and not under subsection (2). Specifically, Zapata did not argue that Petitioner or its counsel had violated any statutes, rules or orders providing for sanctions. That was not an issue below. Rather, Zapata argued that prejudgment interest was due under subsection (1) for TMT's frivolous motion practice and under subsection (3) for its overt efforts to delay the litigation. Thus, Petitioner asks the Court to resolve an issue which was neither raised below nor factually developed. The request should be denied. Such a finding is not likely to

be of help to litigants and is very likely to return the courts below to the uncertainty as to finality which existed prior to *Budinich* and *Osterneck*.

CONCLUSION

If the Court is going to decide how litigants and Courts should treat post-judgment motions for sanctions, it should take a case presenting such an issue. This case does not involve a motion for sanctions. It involves an issue decided unanimously by the Court in 1989. To take the case in order to affirm the decision of the Fifth Circuit would be pointless. To take the case in order to reverse it would return the circuit courts to the case-by-case exercise and the inconsistency that existed prior to *Osterneck*. The Petition should be denied.

Respectfully submitted,

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No. 90-1749

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

TRAILER MARINE TRANSPORT CORPORATION,
Petitioner,

v.

ZAPATA GULF MARINE CORPORATION,
Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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REPLY BRIEF

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REPLY BRIEF

In its petition for a writ of certiorari Trailer Marine Transport Corporation (TMT) demonstrated three things: (1) respondent's motion for prejudgment interest under § 4(a) of the Clayton Act was a motion for sanctions to punish litigation misbehavior; (2) a motion for litigation sanctions is not a motion under Fed. R. Civ. P. 59(e) to alter or amend a judgment; and (3) the Fifth Circuit, in this case, and the Second Circuit, in *Fisher* v. *Klein*, 873 F.2d 626 (2d Cir. 1989), have held that a motion for sanctions is a Rule 59(e) motion, and are thus in conflict with the Third, Fourth, Eighth, and Eleventh Circuits, which have held that it is not. The result is that a notice of appeal, filed after entry of judgment but while a motion for sanctions is pending, is fully effective in four circuits and a nullity in two circuits. This Court's decisions show that the Fifth and Second Circuits are wrong and the other four circuits are correct.

Respondent's claim (Opp., at 8) that *Osterneck* v. *Ernst & Whinney*, 489 U.S. 169 (1989), has produced certainty in the lower courts is flatly wrong. The erroneous decisions of both the Fifth and Second Circuits were made *after Osterneck's* reasoning decisively excluded motions for sanctions from the ambit of Rule 59(e) motions. In fact, the decision of the Fifth Circuit in this case even came after this Court in *Cooter & Gell* v. *Hartmarx Corp.*, 110 S. Ct. 2447, 2456 (1990), equated a motion for litigation sanctions with motions seeking "costs [and] attorney's fees," which are not motions to alter or amend the judgment.

TMT submits that the conflict among the circuits, which was not cured by *Osterneck* and *Cooter & Gell*, requires resolution by this Court. TMT further respectfully submits that the Fifth and Second Circuits are so clearly wrong that the writ should be granted and the decision of the Fifth Circuit here summarily reversed.

Respondent Zapata Gulf Marine Corporation (Zapata) offers two replies to TMT's demonstration. One rests upon a mischaracterization of § 4(a) of the Clayton Act as well

as the record in this case; the other upon a complete misreading of this Court's decisions.

1. Zapata argues that it did not file a motion for sanctions and that § 4(a) of the Clayton Act does not provide for sanctions. Opp., at 11-16. Both assertions are clearly incorrect. Nothing but sanctions for litigation misbehavior were sought in the motion for prejudgment interest and *only* such sanctions are authorized by the statute.

Both points are shown by the complete disparity between the factors a district court considers in deciding a motion to alter or amend a judgment, on the one hand, and, on the other, the factors Zapata urged in its motion for prejudgment interest and those specified by § 4(a) of the Clayton Act.

In *Osterneck*, the Court listed some of the factors the district court considers when evaluating a motion for prejudgment interest that, in fact, seeks to alter or amend the judgment. These were "whether prejudgment interest is necessary to compensate the plaintiff fully for his injuries, the degree of personal wrongdoing on the part of the defendant, the availability of alternative investment opportunities to the plaintiff, whether the plaintiff delayed in bringing or prosecuting the action, and other fundamental considerations of fairness." 489 U.S., at 176.

Not one of these factors, nor anything else going to the merits or to compensation, was raised in Zapata's motion for prejudgment interest. That motion had everything to do with TMT's "efforts to intentionally delay this litigation" (Pet. App. 40a) and nothing to do with the *Osterneck* factors. In fact, while the motion was made for Clayton Act prejudgment interest, it could just as readily have been made under other authority.

Rule 11 authorizes a court to award sanctions in the form of prejudgment interest, *Davis v. Veslan Enterprises*, 765 F.2d 494 (5th Cir. 1985), for litigation conduct that "cause[s] unnecessary delay or needless increase in the cost of litigation." Fed. R. Civ. P. 11. The courts also have *inherent* authority to award sanctions against a party

who " 'shows bad faith by delaying or disrupting the litigation'." *Chambers* v. *NASCO, Inc.*, No. 90-256 (June 6, 1991), slip op., at 12 (quoting *Hutto* v. *Finney*, 437 U.S. 678, 689 n.14 (1978)). And, in a Clayton Act case, the court may award sanctions in the form of prejudgment interest for engaging in conduct "for the purpose of delaying the litigation or increasing the cost thereof." 15 U.S.C. § 15(a). Zapata sought a Clayton Act prejudgment interest sanction for precisely these purposes. It summed up its motion by asserting:

> The process [from complaint to final verdict] took nearly four years because of the dilatory tactics of TMT: five continuances of trial dates, three months to stay the proceedings, two trips to the Fifth Circuit, a motion to recuse, three months of a Rule 11 investigation, two 12(b)(6) motions to dismiss, four summary judgment motions, seven frivolous counterclaims and third-party claims, and refusals to respond to discovery so as to require three motions to compel. TMT has never stopped in its efforts to delay this litigation and increase Plaintiff's costs. If ever a case was appropriate for the imposition of prejudgment interest, this is the case. (Pet. App. 47a-48a)

Not one of the factors itemized by Zapata in support of its motion had anything whatever to do with the merits of or compensation for Zapata's antitrust claim. Consideration of the motion simply did not require any reconsideration of the underlying judgment. Because the motion was exclusively for litigation sanctions, it was completely collateral to the judgment on the merits.

And that was the way the district court treated it. The court's Order and Reasons (Pet. App. 54a) denied prejudgment interest, saying that some of TMT's litigation behavior was "frivolous" but there was "no evidence establishing that TMT acted in bad faith." *Id.*, at 63a. The court added, applying another standard of § 4(a) of the Clayton Act, "TMT was never found to have violated any rules sanctioning dilatory behavior." *Id.*

Thus, it does not matter whether § 4(a) of the Clayton Act authorizes prejudgment interest for anything in addition to sanctions for litigation behavior. Whatever § 4(a) authorizes, Zapata's motion was solely for sanctions and the district court's decision was solely about sanctions. Thus, regardless of how § 4(a) is construed, this case squarely presents the question whether a motion for litigation sanctions is a motion to alter or amend the judgment under Rule 59(e). That is a question to which the courts of appeals have given different answers and which this Court should definitively resolve.

It is clear, in addition, however, that § 4(a) of the Clayton Act is entirely a sanctions statute. *See* Pet., at 15-18.[1] The *Osterneck* factors are not only *not required* to be considered under § 4(a) of the Clayton Act, they are factors that § 4(a) *forbids* the district court to consider.

Where, as here, the proper interpretation of a statute is clear from its plain language, that is where the inquiry should end. *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240-41 (1989). Zapata overlooks completely the plain words of § 4(a), and instead focuses exclusively on its legislative history. *See* Opp., at 11-13. However, even if it were necessary to consult the legislative history here, it is manifest that Congress intended that Clayton Act prejudgment interest be imposed solely as a sanction. *See, e.g.*, 126 Cong. Rec. 23,626 (Aug. 28, 1980) (statement of Rep. McClory) ("The most controversial issue committed

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[1] Zapata's efforts to distinguish sanctions imposed under § 4(a) of the Clayton Act from sanctions imposed under other provisions fall far short of the mark. For example, Zapata asserts that litigation sanctions are "primarily, if not entirely, directed at counsel misconduct," and that Clayton Act prejudgment interest "can only be assessed against the defendant." Opp., at 15; *id.*, at 12. But § 4(a) is directed at the conduct of the party *and* its "representative." *See* 15 U.S.C. § 15(a). Moreover, the fact that the party must pay the fine for the misconduct of its attorney is a feature of § 4(a) that is common in the law. *See, e.g., Chambers*, slip op., at 6 (affirming imposition of $996,644.65 in attorney's fees as sanction against party); *Business Guides, Inc.* v. *Chromatic Communications Enterprises, Inc.*, 111 S. Ct. 922 (1991).

to conference concerned the basis for awarding prejudgment interest. The House approach was to view such awards as a *penalty* for, and a *disincentive* to, *dilatory conduct*. The Senate approach was broader. It viewed such awards as compensating plaintiffs for the loss of the use of the money the plaintiff would have had absent the violation . . . . [*T*]*he House version . . . was the version agreed to in conference.*") (emphasis added).[2]

A motion for sanctions is not a Rule 59(e) motion because, *inter alia*, "sanctions may be imposed years after a judgment on the merits," *Chambers*, slip op., at 22, whereas a Rule 59(e) motion "shall be served not later than 10 days after entry of the judgment." Fed. R. Civ. P. 59(e). While a motion under the Clayton Act for prejudgment interest must be "promptly made"—just as a Rule 11 motion must be made "promptly"—neither Rule 11 nor Clayton Act sanctions motions need be made within 10 days of the entry of judgment.

Zapata has not responded, because no response is possible, to the point that a Clayton Act prejudgment interest motion *cannot* be a Rule 59(e) motion because the former need not be made during the limited period prescribed for making the latter. A simple hypothetical illustrates that point. In an identical case, suppose that a plaintiff were to file a Clayton Act prejudgment interest motion on either

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[2] *See also id.* (statement of Rep. Mazzoli) ("the court must consider whether the parties to the litigation: Acted intentionally or in bad faith to delay the proceedings; or, whether either party violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior; or whether either party engaged in conduct primarily for the purpose of delaying or increasing the cost of the litigation . . . . The courts are limited to *only* these factors in determining whether to award prejudgment interest.") (emphasis added).

Zapata's reliance on the statement of former Assistant Attorney General John Shenefield's testimony, Opp., at 12, is completely misplaced. In addition to being taken out of context, *see* H.R. Rep. No. 875, 96th Cong., 2d Sess. (1980), at 5-7, *reprinted in* 1980 U.S. Code Cong. & Admin. News 2766, 2770-72, that comment related to a version of the legislation that was subsequently superseded.

the ninth or the eleventh day after entry of the judgment and the defendant files its notice of appeal prior to disposition of the motion. Both motions were certainly "promptly made." Under Zapata's interpretation of *Osterneck*, the former motion is a timely Rule 59(e) motion and nullifies the notice of appeal, but the latter is either an untimely Rule 59(e) motion that has no effect on the notice of appeal or a timely non-Rule 59(e) motion that also has no effect on the notice of appeal. In short, Zapata's theory of *Osterneck* creates a "bright-line" rule that depends entirely on labels and when a motion is filed, the identical approach summarily rejected by this Court in *Buchanan* v. *Stanships, Inc.*, 485 U.S. 265 (1988).

2. Zapata contends that *Osterneck* stands for the astounding proposition that "[a] motion for prejudgment interest, discretionary or mandatory, *and regardless of its relationship to the 'merits,'* is a motion to alter or amend a judgment under Rule 59(e)," Opp., at 16 (emphasis added). This Court has never held that a motion is one to alter or amend the judgment *whether or not it seeks to alter or amend the judgment*, and it has repeatedly held to the contrary. *White* v. *New Hampshire Dept. of Employment Security*, 455 U.S. 445 (1982): "Rule [59(e)] was adopted, to 'mak[e] clear that the district court possesses the power' to rectify its own mistakes in the period immediately following the entry of judgment," 455 U.S., at 450, so that there is a clear distinction between *a Rule 59(e) motion which seeks "reconsideration of matters properly encompassed in a decision on the merits," id.*, at 451 (emphasis added), and a motion that "raises legal issues collateral to the main cause of action . . . to which Rule 59(e) was never intended to apply." *Id.*[3]

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[3] *See also Buchanan*, 485 U.S., at 268-69 (assessment of costs "does not involve reconsideration of any aspect of the decision on the merits," was therefore not a motion to alter or amend the judgment, and "[r]espondents' inaccurate designation of their costs request as a Rule 59 motion cannot change this fact"); *Budinich* v. *Becton Dickson & Co.*, 486 U.S. 196, 199 (1988) (a "question remaining to be decided after an order ending litigation on the merits does not prevent finality

The law is clear. A Rule 59(e) motion must seek revision of the judgment. There has never been a case in which the Court held that a postjudgment motion which addressed neither the merits nor the damages is a Rule 59(e) motion. A motion for litigation sanctions, as *Cooter & Gell* said, does not seek such a revision. And, as this Court held only five days ago, litigation sanctions do not depend on the merits of the underlying lawsuit, "but on how the parties conduct themselves during the litigation." *Chambers*, slip op., at 19. The underlying claim is not implicated at all "where sanctions [are] imposed for conduct during the litigation." *Id.*, at 20. It follows that the sanctions motion here did not render TMT's notice of appeal ineffective.

Zapata's answer is that *Osterneck* changed the law, and, rather than building on *White*, *Buchanan*, and *Budinich*, overruled all of those decisions. According to Zapata, the name of the motion now controls, not the motion's relation to the judgment. Thus, since *Osterneck* dealt with a motion for prejudgment interest, "all motions for prejudgment interest are motions under Rule 59(e)," Opp., at 13, to alter or amend the judgment, even if they do *not* seek in any way to alter or amend the judgment. Such an exaltation of label over substance is breathtaking. It is also entirely contrary to *Osterneck* as well as *White*, *Buchanan*, and *Budinich*.

Osterneck involved a motion for equitable, nonstatutory prejudgment interest of a traditional type, completely different from Clayton Act prejudgment interest. The Court held that it was a Rule 59(e) motion because "a district court *must* examine—or in the case of a post-judgment motion, reexamine—matters encompassed within the merits of the underlying action." 489 U.S., at 176 (emphasis added). The Court, as already noted, listed factors to be considered. *See supra* page 2.

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if its resolution will not alter the order or moot or revise decisions embodied in the order").

The *Osterneck* factors go to the adequacy of plaintiff's compensation and draw into question matters encompassed in the judgment. Yet Zapata reads *Osterneck* to mean that a filing captioned, "Motion for Prejudgment Interest as a Rule 11 Sanction," though it had nothing to do with the judgment, would nevertheless be a motion to alter or amend the judgment.

That position is directly at odds with the entire text of *Osterneck*. But Zapata contends that the text is cancelled by a footnote. That note, 489 U.S., at 177 n.3, quoting *Budinich*, states, in pertinent part: " 'Courts and litigants are best served by the bright-line rule, which accords with traditional understanding,' [citation omitted] that a motion for prejudgment interest implicates the merits of the district court's judgment." The motion for prejudgment interest involved in *Osterneck* did implicate the merits of the judgment. But the Court most certainly was not saying that a motion for prejudgment interest as a litigation sanction would be a motion to alter or amend the judgment even though it had no relation whatever to the judgment. That would be to overturn, in a footnote, the rationales of *White*, *Buchanan*, *Budinich*, and *Osterneck* itself.

If that were the case, the Court would hardly have troubled to reason, in the same footnote, that mandatory prejudgment interest is to be treated like discretionary prejudgment interest because it, too, "serves to 'remedy the injury giving rise to the [underlying] action,' [citing *Budinich*, 486 U.S. at 200], and in that sense is part of the merits of the District Court's decision." 489 U.S., at 176-77 n.3. If Zapata's reading were correct, the Court need only have said, "A motion for prejudgment interest, of any kind, is a Rule 59 motion." Instead, in the footnote as in the text, the application of Rule 59(e) is invariably linked to compensation, to remedy, or to the merits of the underlying action.

The Court's "bright-line rule," as it has repeatedly held, is whether the motion requires the district court to reconsider the merits decisions or the damages encompassed

in the judgment. The bright-line-by-label rule Zapata would substitute has been rejected by this Court in *Buchanan*. The Fifth Circuit there adopted the rule that a motion filed within 10 days after the judgment, asking that the judgment be "amended" to include costs, and invoking Rule 59, was a motion to alter or amend the judgment which, as here, made the notice of appeal ineffective. That was precisely the type of "bright-line rule" that Zapata urges here. But this Court rejected it because the motion did not "involve reconsideration of any aspect of the decision on the merits." 485 U.S., at 268. And the Court should do the same with the Fifth Circuit's resurrection of *Buchanan* in this case.

Courts have had no difficulty discerning the sharp distinction between sanctions in the form of Clayton Act prejudgment interest and traditional, equitable prejudgment interest. *Fineman* v. *Armstrong World Industries, Inc.*, Civ. No. 84-3837 (D.N.J. May 6, 1991), relying upon the district court's decision in this case, rejected a claim for Clayton Act prejudgment interest because the defendant's "presentation of its defenses and counterclaim does not come within any of the categories interdicted by the . . . statute," slip op., at 4, and the defendant "did not assert frivolous positions in the case at bar." *Id.*, at 5. However, in the same opinion, the district court granted "simple prejudgment interest" as authorized by New Jersey law, *id.*, a remedy which the New Jersey courts had held was intended "to compensate the plaintiff for the loss of income that would have been earned on the judgment had it been paid earlier." *Ruff* v. *Weintraub*, 105 N.J. 233, 519 A.2d 1384, 1390 (1987). The court in *Fineman* had no difficulty whatever in distinguishing between prejudgment interest as a sanction and prejudgment interest as compensation. Indeed, if distinguishing motions that require reconsideration of the judgment from motions that do not were impossibly difficult, the basis of this Court's Rule 59(e) decisions would be destroyed.

Zapata contends that it would defeat the policies of certainty and predictability cited in *Osterneck* to hold that a

motion for sanctions in the form of Clayton Act prejudgment interest falls outside the scope of Rule 59(e). But the opposite is true. The federal courts have inherent authority and are expressly authorized by numerous other statutes and rules to impose a wide variety of sanctions. *See Chambers*, slip op., at 9-17; *id.*, slip op., at 2-3 (Kennedy, J., dissenting) (discussing the panoply of express sanctioning provisions). Such sanctions, as the Fifth Circuit has held, *see supra* page 2; Pet. at 20, include prejudgment interest. To make the finality of a judgment depend not upon the *White-Buchanan-Budinich-Osterneck* criteria but entirely upon the nature, form, or label of the sanction requested in a particular case would destroy any semblance of consistency and predictability in the federal appellate process.

The confusion in the courts of appeals should be cleared up by the grant of certiorari in this case. If certiorari were denied, the bar would not be sure whether a motion for sanctions because of dilatory litigation tactics is or is not a Rule 59(e) motion or whether a motion under § 4(a) of the Clayton Act is or is not a motion for sanctions. The upshot would be continued uncertainty about when judgments are final and when notices of appeal must be filed. That would surely produce more unjust losses of rights to appeal. That is precisely what happened in this case, where TMT has been wrongfully denied any appellate review of a judgment which, with interest, is rapidly approaching $50,000,000.

June 11, 1991

Respectfully submitted,

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Supreme Court, U.S.
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No. 90-1749

In The

Supreme Court of the United States

October Term, 1990

TRAILER MARINE TRANSPORT CORPORATION,

Petitioner,

v.

ZAPATA GULF MARINE CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

SUPPLEMENTAL BRIEF

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No. 90-1749

In The

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October Term, 1990

TRAILER MARINE TRANSPORT CORPORATION,

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v.

ZAPATA GULF MARINE CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

SUPPLEMENTAL BRIEF

REASONS FOR BRIEF

Respondent Zapata Gulf Marine Corporation ("Zapata") submits this Supplemental Brief pursuant to Rules 15.1 and 15.7. The Supplemental Brief is concerned exclusively with matters inaccessible to Zapata when it filed its Brief in Opposition to the Petition. Zapata believes they demonstrate misstatements of fact and law that bear directly upon the issues the Petition purports to present. The Supplemental Brief should serve to clarify (i) the particular post-trial motion at issue in *Fisher v. Klein*, 873 F.2d 626 (2d Cir. 1989), and (ii) the characterization of

recent authority in the Reply Brief filed by Petitioner Trailer Marine Transport Corporation ("TMT").

PROPOSITION I

One of the principal premises of the Petition is that this case and *Fisher v. Klein*, 873 F.2d 626 (2d Cir. 1989), created a split in the circuits when they "held that a motion for sanctions is a Rule 59(e) motion. . . ." (Reply Brief at 1.) This case certainly did not do so, but Zapata was unable to refute TMT's treatment of *Fisher v. Klein* because the Court of Appeals' opinion in the case is perfunctory, and Zapata's attempts to obtain the record from the archives in New York City were unsuccessful. Zapata has now acquired some of the record in *Fisher v. Klein* through correspondence with counsel involved in the case and retention of a firm to retrieve microfiche from the archives. The materials obtained demonstrate that TMT's characterization of the case is inaccurate. The post-trial motion in *Fisher v. Klein* sought clarification or revision of a judgment awarding sanctions. As such, the motion was unquestionably one to alter or amend the judgment, and was properly found to nullify a notice of appeal filed before the motion was decided.

On August 12, 1988, the district court issued a Memorandum dismissing the complaint, awarding sanctions in an amount to be determined, and directing defendants to submit a proposed form of judgment and affidavits quantifying sanctions. *Fisher v. Klein*, No. 88 Civ. 3367

(LFM), slip op. at 6-7 (S.D.N.Y. Aug. 12, 1988). The unreported Memorandum is reproduced as Appendix A to this Brief.

Judgment dismissing the complaint but awarding sanctions to fewer than all defendants was entered on November 3, 1988. The Judgment is reproduced as Appendix B. Counsel for the three defendants not awarded sanctions then filed a Notice of Motion to Alter or Amend Judgment. The Notice stated that it sought an Order under Rule 59(e) based on the annexed affidavit of counsel, which specified that (i) counsel had previously submitted the detailed records of fees and costs requested by the court "on behalf of the three defendants making this motion," (ii) the Judgment awarded sanctions to all but those three defendants and did not indicate why they were omitted, and (iii) thus, a formal motion requesting that the court "set forth whether or not sanctions are to be awarded" in favor of movers was made "pursuant to the court's direction." Affidavit of Edward A. Meilman ¶¶ 3-5. The Notice and Affidavit are reproduced as Appendix C. The Amended Judgment correcting the list of those awarded sanctions was entered on December 21, 1988, and is reproduced as Appendix D.

Because the Judgment awarded sanctions, the motion to clarify, correct, or expand that award was by definition one "to alter or amend the judgment" as that phrase is used in Federal Rule of Appellate Procedure 4(a)(4). Moreover, the motion did "seek revision of the judgment", and was thus a Rule 59(e) motion under the test proposed by TMT. (Reply Brief at 7.)

Two things follow from consideration of the entries and filings in *Fisher v. Klein*. *First*, the Court of Appeals' action was proper. *Second*, the case did not involve a motion for sanctions in the sense used by TMT. (*E.g.*, Reply Brief at 2-3.)

Accordingly, *Fisher v. Klein* represents neither a wrong decision nor disagreement among the circuits. The case presents factual rather than legal issues, and has no meaning out of context. Certainly, the ruling contains none of the elements specified in Rule 10.1.

PROPOSITION II

In *Fineman v. Armstrong World Industries, Inc.*, No. 84-3837 (D.N.J. May 6, 1991), the district court denied prejudgment interest under the Clayton Act at the same time it granted "simple pre-judgment interest pursuant to N.J. Ct.R. 4:42-11(b). . . . " Slip op. at 5. TMT concludes from this that lower "[c]ourts have no difficulty discerning the sharp distinction between sanctions in the form of Clayton Act prejudgment interest and traditional, equitable prejudgment interest." (Reply Brief at 9.) The distinction is elusive, for prejudgment interest under Clayton Act § 4(a) is discretionary while interest under New Jersey law is mandatory in all but the most "exceptional cases":

> [T]he court *shall*, in tort actions, including products liability actions, include in the judgment simple interest at 8% per annum on the amount of the award from the date of the institution of the action or from a date 6 months after the date of the tort, whichever is later, *provided that in*

> *exceptional cases the court may suspend the running of such prejudgment interest. . . .*

Civil Practice Rules Governing the Courts of the State of New Jersey, Rule 4:42-11(b) (emphasis added).

Consequently, TMT's authoritative assertion that "[t]he court in *Fineman* had no difficulty whatever in distinguishing between prejudgment interest as a sanction and prejudgment interest as compensation" (Reply Brief at 9) is simply wrong. *First*, and most obviously, if the district court drew any distinction, it was between discretionary and mandatory prejudgment interest. *Second*, the purported distinction between prejudgment interest under the state rule and the Clayton Act illustrates the inadequacy of the Petition. What is important is, not whether New Jersey imposes mandatory prejudgment interest, but the fact that under TMT's thesis, courts will have to decide the purpose and character of every provision for prejudgment interest, whether it be imposed by statute, court rule, or case law.[1] What, for example, is a court to do with a provision mandating prejudgment interest *except* when a plaintiff delays?[2] Is prejudgment interest compensation if awarded but a

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[1] Even the lucid language of the New Jersey Rule is subject to dispute. *Compare Martin Marietta Corp. v. New Jersey Nat'l Bank*, 505 F.Supp. 946 (D.N.J.), *aff'd as modified*, 653 F.2d 779 (3rd Cir. 1981), *with Hild v. Bruner*, 496 F.Supp. 93 (D.N.J. 1980).

[2] The New Jersey rule has been so interpreted. *E.g., Espin v. Allergan Pharmaceutical, Inc.*, 127 N.J. Super. 496, 317 A.2d 779 (1973).

sanction if denied? If so, what is the effect on a notice of appeal under Federal Rule of Appellate Procedure 4(a)(4)?[3]

CONCLUSION

TMT's use of *Fisher v. Klein* to demonstrate confusion in the lower courts and its choice of *Fineman* as an example of the certainty and consistency embodied in its approach to post-trial motions is hardly felicitous. *Fisher v. Klein* is unusual and irrelevant, and *Fineman* is just another demonstration of the difficulties inherent in deviating from the bright-line rule drawn by the Court in *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989), and *Budinich v. Becton Dickson & Co.*, 486 U.S. 196 (1988). The state of the law should not be confused for the convenience of a particular litigant. The Petition ought to be denied.

Respectfully submitted,

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June 24, 1991

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[3] There are a number of problematic enactments. *E.g.*, N.M. Stat. § 56-8-4(B); Ohio Rev. Code § 1343.03(C); Pennsylvania Rule of Civil Procedure 238.

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OBADIAH FISHER, Plaintiff, -against- SUSAN KLEIN et al., Defendants.	88 Civ. 3367 (LFM) MEMORANDUM

MacMAHON, District Judge.

Defendants American Express Co., American Express Travel Related Services Co., Inc. ("AMEX"), Alexander Kush ("Kush") and A. Kush & Associates, Ltd. ("AKA") separately move to dismiss the "complaint for declaratory judgment" filed by plaintiff Obadish Fisher ("Fisher") and for an order, pursuant to Rule 11, Fed.R.Civ.P., and 28 U.S.C. § 1927 (1982), awarding costs, attorneys' fees, and injunctive relief against plaintiff and his attorney, John R. Tobiason ("Tobison").

BACKGROUND

On May 13, 1988, Fisher commenced this action, claiming that a declaratory judgment on an agreement (the "Fisher/Columbia Agreement") with defendant Columbia Jewelry Contractors, Inc. ("Columbia") would establish infringement of his copyright for zodiac pendants by the defendants. Recounting some of the extensive procedural history of the two previous related

actions brought by Fisher in this court[1] demonstrates why the instant action must be dismissed and why sanctions are appropriate.

Fisher was a plaintiff in *Ronald Litoff, Ltd. v. American Express Co.*, 83 Civ. 9432 (LFM), an action brought by Fisher's licensee and manufacturer of the zodiac pendants against AMEX and AKA for infringement of copyright. On November 18, 1986, summary judgment was entered against Fisher and his co-plaintiffs on all claims involving the zodiac pendents, based on their failure to raise any genuine issue of material fact in support of the infringement claims.

On December 11, 1986, Fisher commenced another action,[3] *Fisher v. Klein*, 86 Civ. 9522 (LFM) ("Fisher I"), against AMEX, AKA, his co-plaintiffs in *Litoff*, and certain individual defendants, alleging copyright infringement and other claims with respect to the zodiac pendants and five other pendants.

Meanwhile, on February 9, 1987, after unsuccessfully trying to appeal the judgment,[4] Fisher moved to vacate the *Litoff* judgment based on certain "new evidence" which he claimed raised factual issues precluding summary judgment. The new evidence consisted of the Fisher/Columbia Agreement, motion papers previously submitted by Columbia, and a third party's affidavit claiming to have purchased a zodiac pendant in late 1982. We denied Fisher's motion to vacate the *Litoff* judgment on April 23, 1987, concluding that "[t]he 'new evidence' which Fisher relies upon fails to demonstrate that any infringement occurred or that an unauthorized sales promotion was conducted."[5]

Subsequently, in response to motions by various defendants in *Fisher I* to dismiss and for sanctions, the complaint was dismissed for failing to allege facts concerning registration of copyrights to the various pendants.[6] The dismissal was without prejudice to filing an amended complaint, although Fisher and his counsel were urged to "carefully consider their obligations under Rule 11, Fed.R.Civ.P." before doing so. Fisher filed an amended complaint, realleging his infringement claims for four pendants, including the zodiac pendants, and defendants renewed their motions to dismiss the complaint.

By memorandum and order dated February 3, 1988, we granted summary judgment to all *Fisher I* defendants on plaintiff's zodiac pendant claims on the ground that the claims were barred by res judicata. We also granted summary judgment to AMEX, AKA, Kush, and Susan Klein ("Klein") on two other pendants due to Fisher's failure to allege any factual basis for copyright infringement and defendants' unequivocal denial of such conduct. Plaintiff's state law claims to copyright ownership against Klein were also dismissed for the three pendants. We denied summary judgment with respect to the fourth pendant, the family roots pendant, because Fisher asserted personal knowledge of an unauthorized promotion by AMEX and AKA. Finally, we reserved decision on defendants' motions for sanctions until discovery was completed on Fisher's family roots pendant claims.

On March 29, 1988, Fisher failed to appear at his scheduled deposition, and, after some discussion, Tobiason stipulated to dismiss with prejudice his client's remaining family roots pendant claims against AMEX

and AKA.[8] On March 30, 1988, an order granting summary judgment to the other defendants was issued on all claims. Shortly thereafter, Fisher moved for a declaratory judgment in *Fisher I* on the Fisher/Columbia Agreement, objected to entry of any judgment dismissing AMEX and AKA as parties in *Fisher I*, and instituted the instant action for declaratory judgment on the Fisher/Columbia Agreement (*"Fisher II"*).

DISCUSSION

Motion to Dismiss

The actions of Fisher and his attorney in this litigation constitute a frontal assault on the doctrine of res judicata, "a rule of fundamental and substantial justice, 'of public policy and of private peace.' "[9] Plaintiff continues to press an argument that we have rejected three times,[10] *i.e.*, that AMEX and AKA infringed plaintiff's copyright by selling zodiac pendants under the Fisher/Columbia Agreement. Even if plaintiff's argument had any merit (and we believe that it does not),[11] we are foreclosed from considering it. The application of the principles of res judicata to Fisher's zodiac pendant claims has been discussed fully in prior decisions and need not be repeated here.[12]

Accordingly, the motions of AMEX and AKA to dismiss the instant action are granted as to them and, *sua sponte*, to all other defendants.

Sanctions

Plaintiff's refusal to abide by the decisions of this court warrants sanctions under both 28 U.S.C. § 1927 and Rule 11. Section 1927 provides, in part, that "any attorney . . . who so multiples the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." A clear showing of bad faith is required before sanctions may be imposed under § 1927.[13] Defendants AMEX and AKA have made such a showing.

Plaintiff's bad faith clearly appears in a number of instances. Each adverse decision has been ignored, reargued, and circumvented by filing additional actions or motions. Particularly egregious examples of plaintiff's conduct include: (1) filing a second action for copyright infringement of the zodiac pendant while seeking to vacate the adverse judgment in the first action; (2) after entry of summary judgment against him on three pendants and avoiding summary judgment on the fourth by claiming personal knowledge of infringing activity in *Fisher I*, Fisher failed to appear at a deposition concerning the fourth pendant; instead, his attorney agreed to dismiss the claims against AMEX and AKA with prejudice. Plaintiff then opposed entry of final judgment in favor of AMEX and AKA, despite the absence of any viable claim against them; (3) after entry of summary judgment in favor of all but a few individual defendants in *Fisher I*, plaintiff filed a "motion for declaratory judgment" on the Fisher/Columbia Agreement. Before the return date of that motion, plaintiff filed *Fisher II*, the instant action for a declaratory judgment on the Agreement.

Plaintiff's conduct, at least from the time of the memorandum and order granting summary judgment to AMEX and AKA in *Fisher I*, also violated Rule 11. The subsequent papers signed by Tobiason were not "warranted by existing law or a good faith argument for the extension, or reversal of existing law." Rather, they were interposed to harass, delay, and increase the cost of defending this frivolous litigation.

"It is especially appropriate to impose sanctions where the doctrines of *res judicata* and collateral estoppel plainly preclude relitigation of the suit."[14] Similar patterns of reasserting claims that have been rejected by the court have resulted in sanctions against plaintiffs and their attorneys.[15] Accordingly, sanctions are warranted.

Defendants request (1) reimbursement of their attorneys' fees and costs to compensate them for plaintiff's past abuses, and (2) entry of an order permanently enjoining plaintiff from commencing any judicial proceeding based on the same claim, to prevent future abuses. We conclude that monetary sanctions should be imposed against Tobiason and Fisher jointly, but that injunctive relief is not warranted at this time. Injunctive relief against abusive litigants has been granted when other sanctions have proven ineffective.[16] Plaintiff has not been sanctioned previously in this court, and defendants offer no reason why monetary sanctions would not adequately deter future violations of § 1927 and Rule 11.

CONCLUSION

Accordingly, the complaint is dismissed as to all defendants on the merits, and sanctions are awarded

against Fisher and Tobiason in an amount to be determined subsequently. Defendants, therefore, are directed to submit, within ten (10) days, affidavits and contemporaneous time records detailing fees and costs incurred after February 3, 1988, and to submit the form of a judgment, pursuant to Rule 54(b), Fed.R.Civ.P., dismissing plaintiff's claims in both *Fisher v. Klein* actions. Plaintiff shall have ten (10) days thereafter to oppose the amount of sanctions and to present any evidence of financial inability to pay sanctions.

Dated: New York, N. Y.

August 12, 1988

/s/ Lloyd F. MacMahon
LLOYD F. MacMAHON
United States
District Judge

Fisher v. Klein et al. – 88 Civ. 3367 (LFM)

FOOTNOTES

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[1] Fisher has also pursued an action in state court, *Fisher v. Klein*, No. 07102/87 (Supreme Court, New York County).

[2] *Ronald Litoff, Ltd. v. American Express Co.*, 621 F. Supp. 981, 983-84 (S.D.N.Y. 1985).

[3] In *Litoff*, Fisher originally appeared pro se. He was represented by Cheryl Fax-Davidson, Esq., beginning February 15, 1985. Tobiason began representing Fisher in August 1986 in *Litoff* and represented him from the outset in *Fisher v. Klein*, 86 Civ. 9522.

[4] Fisher repeatedly sought to appeal the judgment in *Litoff* before it became final.

[5] *Ronald Litoff, Ltd. v. American Express Co.*, 83 Civ. 9432 (LFM) (S.D.N.Y. Apr. 23, 1987). The decision also denied defendants' motions for sanctions.

[6] *Fisher v. Klein*, 86 Civ. 9522 (LFM) (S.D.N.Y. July 13, 1987). The substantive grounds for defendants' motions – lack of standing, improper joinder, and res judicata – were not considered because of the threshold jurisdictional issue.

[7] *Fisher v. Klein*, 86 Civ. 9522 (LFM) (S.D.N.Y. Feb. 3, 1988).

[8] Fisher's failure to appear at his scheduled deposition is the subject of a separate motion by AKA for sanctions against plaintiff. The discussion herein applies to that motion as well.

[9] *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) (quoting *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917).

[10] *Ronald Litoff, ltd. v. American Express Co., supra*, 621 F. Supp. at 984 (opinion granting summary judgment); *Ronald Litoff, Ltd. v. American Express Co.*, 83 Civ. 9432 (LFM) (S.D.N.Y. Apr. 23, 1987) (endorsement denying Fisher's motion to vacate judgment); *Fisher v. Klein*, 86 Civ. 9522 (LFM) (S.D.N.Y. Feb. 3, 1988) (memorandum and order granting summary judgment to all defendants on the ground that Fisher's claims were barred by res judicata).

[11] The Fisher/Columbia Agreement provided, in part, that:

> "8. Based on a September 1981 market test, this Agreement shall commerce on September 1, 1981. If American Express rolls forward with a full mailing after the market test, this contract shall continue to remain in effect for as long as American Express markets the Pendants. Columbia must notify Susan Obie, in writing, of the start-up and end of all American Express mailings and the status of the orders from these mailings. Susan Obie will honor American Express exclusivity during the time they are marketing the Pendants. If American Express, after the market test, does not market the Pendant, then the term of this Agreement shall be deemed to have commenced on or about September 1, 1981 and shall continue for one year expiring on August 31, 1982. During this period, Columbia must notify Susan Obie in writing of all its sales of the Pendants. It is understood that Susan Obie shall receive royalties on any payments for the sales of the Pendants received by Columbia after the termination of this Agreement. When the Agreement ends, either on August 31, 1982 or when American Express stops selling the Pendants, Columbia shall own the physical molds. Columbia understands that even if they do not return the molds and models they will not be able to use them, since Susan Obie holds the copyright.
>
> * * *
>
> 12. Except as herein otherwise expressly provided, upon the termination of this Agreement, whether by the expiration of the term hereof, or cancellation, or for any other cause whatsoever, the license herein granted and all right of Columbia to the use of the copyright and the sale of the pendants shall cease and terminate forthwith. Upon such termination, Columbia shall discontinue and abandon the use of

> the copyright; and shall cease to represent or advertise that it is in any way connected with Susan Obie. Notwithstanding such termination, Columbia shall have the right to fulfill and make delivery of all orders received by it prior to such termination and, for such purpose, to use the copyright in the manner herein before set forth, provided, however, that Columbia shall pay royalties thereon."

Fisher has contended throughout this litigation that the October 1982 marketing infringed his copyright to the pendants because it was unauthorized by these paragraphs. We rejected that contention summarily in the *Litoff* case. It is undisputed that AMEX did "roll[] forward with a full mailing" of the pendants. The unambiguous language of the Fisher/Columbia Agreement, therefore, provides that "the contract . . . continue[d] to remain in effect for as long as American Express market[ed] the Pendants." No unauthorized promotion took place.

[12] *Fisher v. Klein*, 86 Civ. 9522 (LFM) (S.D.N.Y. Feb. 3, 1986) (memorandum and order granting partial summary judgment, at 3-7).

[13] *Oliveri v. Thompson*, 803 F.2d 1265, 1273 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 1373 (1987).

[14] *McLaughlin v. Bradlee*, 602 F.Supp. 1412, 1417 (D.D.C. 1985), *aff'd*, 803 F.2d 1197 (D.C. Cir. 1986).

[15] *See, e.g., Record Club of America, Inc. v. Credit Services, Inc.*, 117 F.R.D. 359, 361 (S.D.N.Y. 1987); *Rand v. Anaconda-Ericsson, Inc.*, 625 F.Supp. 176, 184 (E.D.N.Y. 1985); *Andre v. Merrill Lynch Ready Assets Trust*, 97 F.R.D. 699, 702 (S.D.N.Y. 1983).

[16] *See In re Martin Trigona*, 737 F.2d 1254, 1261-62 (2d Cir. 1984) (injunctive relief against abusive litigant upheld when his impending bankruptcy made monetary sanctions fruitless).

APPENDIX B

DOC # 19

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OBADIAH FISHER, Plaintiff, – against – SUSAN KLEIN, JAMES BENEDETTO, COLUMBIA JEWELRY CONTRACTORS, INC., COLUMBIA ORIGINALS, INC., RONALD LITOFF, RONALD LITOFF, INC., ALEXANDER KUSH. A. KUSH & ASSOCIATES, LIMITED, AMERICAN EXPRESS COMPANY, AMERICAN EXPRESS TRAVEL RELATED SERVICES, INC., "JOHN DOE" (fictitious name), and "JOHN DOE, INC." (fictitious name), Defendants.	88 Civ. 3367 (LFM) JUDGMENT #88,2182 FILED NOV 3 1988

This action having come on by motion before the court, Honorable Lloyd F. MacMahon, District Judge, presiding; and judgment dismissing the claims of plaintiff Obadiah Fisher against defendants, American Express Company, American Express Travel Related Services Co., Inc., Susan Klein, Alexander Kush, A. Kush & Associates, Limited, James Benedetto, Columbia Jewelry Contractors, Inc., Columbia Originals, Inc., Ronald Litoff, and Ronald

Litoff, Inc., having been granted by Memorandum dated August 12, 1988, now, therefore

IT IS ORDERED, ADJUDGED, AND DECREED that plaintiff Obadiah Fisher take nothing, and that his action against defendants, American Express Company, American Express Travel Related Services Co., Inc., Susan Klein, Alexander Kush, A. Kush & Associates, Limited, James Benedetto, Columbia Jewelry Contractors, Inc., Columbia Originals, Inc., Ronald Litoff, and Ronald Litoff, Inc., be dismissed in its entirety, with prejudice and on the merits; and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that sanctions in the amount of $15,769.13 be awarded against plaintiff Obadiah Fisher and his attorney, John R. Tobiason, Esq., jointly and severally, in favor of defendants, American Express Company and American Express Travel Related Services Co., Inc.; and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that sanctions in the amount of $1,825.00 be awarded against plaintiff Obadiah Fisher and his attorney, John R. Tobiason, Esq., in favor of defendants, James Benedetto, Columbia Jewelry Contractors, Inc., Columbia Originals, Inc., Ronald Litoff, and Ronald Litoff, Inc.; and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that receipts for payment of the above sanctions, duly signed by defendants herein, shall be filed by plaintiff Obadiah Fisher and his attorney, John R. Tobiason, Esq., with the Clerk of the court within twenty (20) days; and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, if plaintiff Obadiah Fisher and his attorney, John R. Tobiason, Esq., fail to comply with the foregoing terms of this order, defendants shall submit, within twenty (20) days of such non-compliance, an order permanently enjoining plaintiff Obadiah Fisher and his attorney, John R. Tobiason, Esq., from filing any further actions or proceedings in this court involving the copyrights on the pendants described in the complaint filed in this action.

Dated: New York, N. Y.
November 3, 1988

/s/ Lloyd F. MacMahon
LLOYD F. MacMAHON
United States District Judge

THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON 11-4-88.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RECEIVED 11-14-88 MD

OFFICE OF THE CLERK
US DISTRICT COURT, SDNY

OBADIAH FISHER,
Plaintiff,
v.
SUSAN KLEIN, et al.,
Defendants.

DOC # 21

88 Civ. 3367 (LFM)

NOTICE OF MOTION TO ALTER OR AMEND JUDGMENT

FILED
NOV 14 1988

PLEASE TAKE NOTICE that upon the annexed affidavit of Edward A. Meilman, Esq. sworn to on November 9, 1988 and upon all the papers and proceedings heretofore had herein, the undersigned as attorney for Alexander Kush, A. Kush & Associates Ltd. and Susan Klein will move this court before the Honorable Lloyd F. MacMahon, United States District Judge, in Room 1505, United States Courthouse, Foley Square, New York, New York 10007 at 9:30 A.M. on November 22, 1988 or as soon thereafter as counsel can be heard, for an Order pursuant to Rule 59(e) of the Federal Rules of Civil Procedure amending and altering the judgment dated November 3, 1988 to set forth whether or not sanctions are to be awarded against plaintiff Obadiah Fisher and his attorney John R. Tobiason, Esq., jointly and severally, in favor of

the moving defendants and if such sanctions are to be awarded, the amount thereof.

Dated: New York, New York
November 9, 1988

/s/ Edward A. Meilman
Edward A. Meilman, Esq.
OSTROLENK, FABER, GERB
& SOFFEN
Attorney for Defendants
Alexander Kush et al.
1180 Avenue of the Americas
New York, New York 10036
(212) 382-0700

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

OBADIAH FISHER,

Plaintiff,

v.

SUSAN KLEIN, et al.,

Defendants.

88 CIV. 3367 (LFM)

----------X

State of New York)
) ss.:
County of New York)

AFFIDAVIT OF EDWARD A. MEILMAN

EDWARD A. MEILMAN being duly sworn deposes and says:

1. I am a member of the bar of this court and of the State of New York and am the attorney for the defendants Alexander Kush, A. Kush & Associates Ltd. and Susan Klein in the above captioned action. I submit this Affidavit in support of the motion of the aforesaid defendants pursuant to Rule 59(e) of the Federal Rules of Civil Procedure to alter or amend the judgment of this court dated November 3, 1988.

2. By Memorandum issued August 12, 1988, this court dismissed the Complaint as to all defendants on the merits and indicated sanctions were to be awarded against Obadiah Fisher and John Tobiason in an amount to be subsequently determined. The court directed all

defendants to submit within 10 days affidavits and contemporaneous time records detailing fees and costs incurred after February 3, 1988.

3. On August 22, 1988 the undersigned submitted a affidavit and contemporaneous time records detailing fees and costs on behalf of the three defendants making this motion. A true copy of that affidavit with its exhibits is attached hereto for the convenience of the court as Exhibit A.

4. In the Judgment issued by this court on November 3, 1988 the court issued sanctions against plaintiff and his attorney Mr. Tobiason in favor of all defendants except Alexander Kush, A. Kush & Associates Ltd. and Susan Klein. The Judgment is silent and therefore also does not indicate whether the court had determined that no sanctions should be awarded to these defendants.

5. I respectfully submit that the court should alter or amend the Judgment of November 3, 1988 to set forth whether or not sanctions are to be awarded against Obadiah Fisher and John Tobiason in favor of defendants Alexander Kush, A. Kush & Associates Ltd. and Susan Klein, and if so in what amount. This request is being made by formal motion rather than by letter or telephone

inquiry pursuant to this court's direction contained in the letter of the court dated November 2, 1988.

/s/ Edward A. Meilman
EDWARD A. MEILMAN

Sworn to before me this 9th day
of November, 1988.

/s/ Irene SooHoo
Notary Public

IRENE SOOHOO
Notary Public, State of New York
No. 31-4754327
Qualified in New York County
Commission Expires October 31, 1989

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OBADIAH FISHER, Plaintiff, – against – SUSAN KLEIN, JAMES BENEDETTO, COLUMBIA JEWELRY CONTRACTORS, INC., COLUMBIA ORIGINALS, INC., RONALD LITOFF, RONALD LITOFF, INC., ALEXANDER KUSH, A. KUSH & ASSOCIATES, LIMITED, AMERICAN EXPRESS COMPANY, AMERICAN EXPRESS TRAVEL RELATED SERVICES, INC., "JOHN DOE" (fictitious name), and "JOHN DOE, INC." (fictitious name), Defendants.	DOC # 25 88 Civ. 3367 (LFM) AMENDED JUDGMENT FILED DEC 21 1988 #88,2585

This action having come on by motion before the court, Honorable Lloyd F. MacMahon, District Judge, presiding; and judgment dismissing the claims of plaintiff Obadiah Fisher against defendants, American Express Company, American Express Travel Related Services Co., Inc., Susan Klein, Alexander Kush, A. Kush & Associates, Limited, James Benedetto, Columbia Jewelry Contractors, Inc., Columbia Originals, Inc., Ronald Litoff, and Ronald Litoff, Inc., having been granted by Memorandum dated August 12, 1988, now, therefore,

IT IS ORDERED, ADJUDGED, AND DECREED that plaintiff Obadiah Fisher take nothing, and that his action against defendants, American Express Company, American Express Travel Related Services Co., Inc., Susan Klein, Alexander Kush, A. Kush & Associates, Limited, James Benedetto, Columbia Jewelry Contractors, Inc., Columbia Originals, Inc., Ronald Litoff, and Ronald Litoff, Inc., be dismissed in its entirety, with prejudice and on the merits; and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that sanctions in the amount of $15,769.13 be awarded against plaintiff Obadiah Fisher and his attorney, John R. Tobiason, Esq., jointly and severally, in favor of defendants, American Express Company and American Express Travel Related Services Co., Inc.; and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that sanctions in the amount of $1,825.00 be awarded against plaintiff Obadiah Fisher and his attorney, John R. Tobiason, Esq., in favor of defendants, James Benedetto, Columbia Jewelry Contractors, Inc., Columbia Originals, Inc., Ronald Litoff, and Ronald Litoff, Inc.; and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that sanctions in the amount of $6,803.30 be awarded against plaintiff Obadiah Fisher and his attorney, John R. Tobiason, Esq., in favor of defendants, Alexander Kush and A. Kush & Associates, Limited; and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that receipts for payment of the above sanctions, duly signed by defendants herein, shall be filed by plaintiff Obadiah Fisher and his attorney, John R.

Tobiason, Esq., with the Clerk of the court within twenty (20) days; and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, if plaintiff Obadiah Fisher and his attorney, John R. Tobiason, Esq., fail to comply with the foregoing terms of this order, defendants shall submit, within twenty (20) days of such non-compliance, an order permanently enjoining plaintiff Obadiah Fisher and his attorney, John R. Tobiason, Esq., from filing any further actions or proceedings in this court involving the copyrights on the pendants described in the complaint filed in this action.

Dated: New York, N. Y.
December 21, 1988

/s/ Lloyd F. MacMahon
LLOYD F. MacMAHON
United States District Judge

THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON 12-22-88.